88-1483

No.

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
*Petitioner,*

vs.

DAVID T. JORDAN,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KENTON E. KNICKMEYER
THOMPSON & MITCHELL
Suite 3400
One Mercantile Center
St. Louis, MO 63101
(314) 231-7676

*Counsel for Petitioner Clayton Brokerage Co. of St. Louis, Inc.*

Of Counsel:

Mike W. Bartolacci
Thompson & Mitchell
Suite 3400
One Mercantile Center
St. Louis, MO 63101
(314) 231-7676

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

## QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of punitive damages in a civil case violates a defendant's right under the Eighth Amendment to the Constitution of the United States to be free from excessive fines where the award of punitive damages is approximately fifty times the actual damages determined to have been incurred by the plaintiff?

2. Whether an award of punitive damages against a defendant in a civil case is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?

3. Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a defendant's net worth prior to reaching a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?

4. Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. §§ 6b, 6c preempt state law which would otherwise apply to the conduct described in those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?

## STATEMENT OF PARTIES

Plaintiff-Appellee in the proceeding below was David T. Jordan. Defendant-Appellant below was Clayton Brokerage Co. of St. Louis, Inc.[1] Martin Rachlin was a defendant in the proceeding below but was dismissed prior to trial.

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[1] Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc., ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

### OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit, dated December 8, 1988, denying rehearing en banc and rehearing, is not officially reported, but is reproduced at Appendix A to this Petition. The Opinion of the United States Court of Appeals for the Eighth Circuit, dated October 17, 1988, is officially reported at 861 F.2d 172, and unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 24,346. A copy of that opinion is reproduced at Appendix B to this Petition.

The decision of the United States District Court for the Western District of Missouri, entered February 5, 1987, is not officially reported. That decision is reproduced at Appendix C to this Petition.

## JURISDICTION

The decision of the Court of Appeals was entered on October 17, 1988. The Court of Appeals entered its Order denying a timely petition for rehearing en banc and denying a petition for rehearing on December 8, 1988.

This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

2. The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

3. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

U.S. CONST. amend. V.

4. Sections 4b and 4c of the Commodity Exchange Act (7 U.S.C. §§ 6b, 6c) provide in pertinent part:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made or to be made for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive . . . such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> * * *
>
> It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction in-

volving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a 'wash sale,' 'cross trade,' or 'accommodation trade,' or is a fictitious sale;

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

5. Section 14(a) of the Commodity Exchange Act provides in pertinent part:

Any person complaining of any violation of any provision of this Act . . . by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation."

7 U.S.C. § 18(a).

6. Section 22 of the Commodity Exchange Act provides in pertinent part:

(a)(1) Any person . . . who violates this Act or who willfully aids, abets, counsels, induces, or procures the

> commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions refered to in clauses (A) through (D) of this paragraph and caused by such violation. . . .

7 U.S.C. § 25.

## STATEMENT OF THE CASE

This case arises out of a series of transactions in commodity futures contracts that occurred during 1980 and 1981. The transactions were all executed on boards of trade designated as "contract markets" by the Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5 of the Commodity Exchange Act, 7 U.S.C. § 7 (the "CEA").

Each transaction was executed by Petitioner Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") in its capacity as a futures commission merchant (an "FCM") registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. § 6f. Ostensibly, the transactions were being executed for the accounts of various of Clayton's customers, including Respondent, David Jordan. In fact, one of Clayton's associated persons,[2] Martin Rachlin, intentionally caused many of the transactions to be "switched" from the accounts for which they were originally supposed to have been executed to other accounts, including certain accounts opened by Rachlin in fictitious names and controlled by himself.

Through this "switching" of trades after they were executed, Rachlin was able to control, at least to some extent, the profitability of his (and his customers') accounts. Profitable trades

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[2] Pursuant to Section 4k of the CEA, 7 U.S.C. § 6k, any person associated with a futures commission merchant in a capacity which involves the solicitation or acceptance of customers' orders or the supervision of persons so engaged is to be registered as an associated person.

could be allocated to his personal accounts or, in order to placate dissatisfied customers, to their accounts from either Rachlin's personal accounts or the accounts of complaining customers.

In addition to (and, perhaps, to facilitate) this "switching" of trades, Rachlin secured trading authorizations (essentially limited powers of attorney permitting Rachlin to place orders for his customer's accounts on a discretionary basis)[3] from some of his customers, including Respondent Jordan. Utilizing Jordan's trading authorization, Rachlin churned Jordan's account.

As a result of Rachlin's misconduct, Jordan sustained losses amounting to $7,923.50. Jordan initiated suit in federal district court against Clayton and Rachlin, alleging that they had violated the antifraud provisions of the CEA, 7 U.S.C. § 6b, committed common law fraud, and breach of fiduciary duty.

The case was set for trial in the Spring of 1984. On the first day of trial, the court dismissed the jury and took the case off the docket to permit further discovery. On May 9, 1984, the Eighth Circuit Court of Appeals decided *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984), holding (among other matters) that state law remedies were not preempted by the CEA. Jordan filed two subsequent amended complaints, the second amended complaint being filed on or about July 25, 1985. Prior to trial of the claims asserted in the Second Amended Complaint, Jordan dismissed his claims against Martin Rachlin.

The case proceeded to trial on Jordan's claim against Clayton for fraud in violation of Section 4b of the CEA, 7 U.S.C. § 6b and common law breach of fiduciary duty. As to the later claim, Clayton had pled, as a defense, that the complaint failed

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[3] The use of trading authorizations is regulated by the CFTC pursuant to 17 C.F.R. § 166.2.

to state a claim upon which relief could be granted. The basis for that defense was that the Commodity Exchange Act preempted the state law relied on by the plaintiff as a theory of recovery. This point was not pressed in the District Court or the Court of Appeals because of the *Kerr* decision.

During the trial, Plaintiff was permitted (over the objection of Clayton) to present the jury with evidence of Clayton's net worth. The jury was also presented (over Clayton's objections) with a veritable mountain of evidence pertaining to Rachlin's misconduct in the handling of trades for customers other than Jordan.

When the case was submitted to the jury, the jury was instructed (again, over Clayton's objections) that it could award punitive damages against Clayton if it concluded, based on the preponderance of the evidence, that Clayton had engaged in the misconduct alleged. The jury returned a verdict in favor of Jordan on both counts for actual damages in the amount of $7,923.50. The jury also awarded Jordan $400,000.00 in punitive damages on the common law claim for breach of fiduciary duty.

Clayton's motions for judgment notwithstanding the verdict, for remittitur or for a new trial were overruled by the Court, and judgment was entered on the verdict. Clayton appealed to the U.S. Court of Appeals for the Eighth Circuit.

In a 2-1 decision, a panel of the Court of Appeals affirmed the judgment of the District Court. The court held (a) that the award of punitive damages in a ratio to the actual damages of 50-1 was not excessive as a matter of law, and (b) that Clayton's constitutional rights to equal protection and due process were not violated (i) by the submission to the jury of evidence of Clayton's net worth or (ii) by the jury instructions permitting the jury to award punitive damages against Clayton without

first determining that the evidence established Clayton's guilt beyond any reasonable doubt.[4]

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[4] Clayton did not raise the preemption issue in the Court of Appeals because the Eighth Circuit had already resolved that issue adversely to Clayton's position in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984). Because it is the practice of the Eighth Circuit that each panel of the Court is bound by the prior decisions of the Court, *see, United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert. denied*, 464 U.S. 934 (1983), raising the preemption issue would have been futile.

## REASONS FOR ISSUANCE OF THE WRIT

The writ should issue because the questions presented by this case, individually and collectively, are issues of substantial importance that have not been, but ought to be, resolved by this Court. It is particularly apropos that they be considered in a context, such as that presented by this case, involving conduct subject to a full panoply of legislatively prescribed administrative, civil and criminal remedies and sanctions. In such a context, the Court can weigh the competing interests implicated by the procedural protections sought by Petitioner and the remedy afforded the Respondent in reference to a concrete standard: the procedures and remedies which Congress deemed appropriate for the conduct in question.

### A. The Importance Of The Issues

#### 1. Constitutional limitations on punitive damages generally.

The constitutionality of permitting civil juries to mete out punishment through punitive damage awards has long been questioned. Ghiardi & Kircher, *Punitive Damages: Law ans Practice,* § 3.01 (1985) (hereinafter "Ghiardi & Kircher"); *The Case Against Punitive Damages*, Defense Research Institute (1969). While the question is an old one, it has not received the careful consideration it deserves. In this case, for example, the issue of what limitations the Constitution imposes on the practice of permitting a civil jury to punish a defendant by means of punitive damages was decided on the basis that because punitive damages are civil in nature, a defendant against whom such an award is sought is not entitled to the protections afforded persons threatened with punishment under the criminal law. *Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 861 F.2d 172, 178 (8th Cir. 1988). This, apparently, has been the historical practice of courts. *See, e.g. Ghiardi & Kircher,* § 213; Morris, *Punitive Damages In Tort Cases*, 44 Harv.L.Rev. 1173, 1197 (1931).

The label placed on a proceeding, however, does not control the determination of what procedural protections must be afforded a defendant. *See, e.g. United States v. Ward*, 448 U.S. 242 (1980); *In Re Winship*, 397 U.S. 358 (1970); *In Re Gault*, 387 U.S. 1 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Boyd v. United States*, 116 U.S. 616 (1885). This principle dictates that the process of awarding punitive damages in civil cases be carefully examined to determine what procedural safeguards are required by the Constitution to be accorded defendants against whom a punitive damage award is sought.

Only last term, the Court noted the importance of such questions. *Banker's Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1651; 108 S.Ct. at 1655 (O'Conner, J., concurring). The urgency of resolving those questions is increasing with the passage of time.

As punitive damage awards increase in size and frequency,[5] their impact on society at large and the legal system increases. Because there are, at present, no clear guidelines by which the size of punitive damage awards are to be fixed in any given case, it is virtually impossible to predict the size of a potential punitive damage award. Comment, *Punitive Damages: The Burden of Proof Required By Procedural Due Process*, 22 U.S.F.L. Rev. 99, 114 (1987). The possibility of large punitive damage awards has, as it did in this case, encouraged protracted litigation over claims otherwise modest in their size. It has made it increasingly difficult for businesses and professionals to obtain insurance, and has induced many businesses to withdraw

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[5] *See, e.g.* Peterson, *Punitive Damages: Preliminary Empirical Findings*, The Institute For Civil Justice (Rand Corporation) (1985); Peterson, *Punitive Damages, Empirical Findings*, The Institute For Civil Justice (Rand Corporation) (1987); Sella, *The 10 Largest Jury Verdicts of 1988*, 75 ABA Journal 45 (March 1989).

from markets perceived to involve high risks of litigation. *Id.* at pp. 102-112. In this term alone, the Court has been asked to review at least 4 cases to determine the efficacy of the procedures that were followed in awarding punitive damages against defendants in private civil litigation.[6]

In view of the increasing frequency with which the issues arise and the increasingly high economic stakes involved in the cases in which the issues are raised, it seems probable that this Court, the lower federal courts, and the state courts will continue to be confronted with litigants pressing the constitutional issues raised by this case until this Court definitively resolves those issues.

**2. Preemption of state law by the Commodity Exchange Act.**

Like the constitutional issues pertaining to punitive damage awards, the question of whether the Commodity Exchange Act preempts state law insofar as that law would govern the conduct of persons engaged in commodity futures trading is a recurring

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[6] *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987), *cert. denied*, 57 U.S.L.W. 3486 (U.S. Jan. 24, 1989) (No. 88-157); *CNA Casualty of California v. Rouhe, petition for cert. dismissed pursuant to Rule 53*, 57 U.S.L.W. 3261 (U.S. Oct. 11, 1988) (No. 88-297); *Metromedia, Inc. v. April Enterprises, Inc., petition for cert. filed*; 57 U.S.L.W. 3353 (U.S. Oct. 14, 1988) (No. 88-625); *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-556).

issue in suits filed with lower federal courts as well as state courts.[7]

This Court first addressed the question in 1947, when it decided the case of *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247 (1947). In that case, the Court indicated that the

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[7] *See, e.g. Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987); *Point Landing Co., Inc. v. Rudolf Wolff & Co., Ltd.*, 795 F.2d 415 (5th Cir. 1986); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982); *Kelly v. Carr*, 691 F.2d 800 (6th Cir. 1980); *E.F. Hutton & Co., Inc. v. White*, 2 Comm. Fut. L. Rep. (CCH) ¶ 24, 314, (D. Mass. 1988); *Babst v. Morgan Keegan & Co.*, 1987 U.S. Dist. Lexis 7165 (E.D. La. 1987); *Cady v. A.G. Edwards & Sons, Inc.*, 648 F. Supp. 621 (D. Utah 1986); *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203 (N.D. Ga. 1985); *McCarthy v. Paine Webber, Inc.*, 618 F. Supp. 933 (N.D. Ill. 1985); *Mallen v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 605 F. Supp. 1105 (N.D. Ga. 1985); *Zieg v. Shearson/American Express, Inc.*, 592 F. Supp. 610 (E.D. Va. 1984); *Peavey Company v. Mitchell*, Comm. Fut. L. Rep. (CCH) ¶ 21,939 (W.D. Okla. 1983); *Taylor v. Bear Stearns and Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Vaccariello v. Financial Partners Brokerage, Ltd.*, Comm. Fut. L. Rep. (CCH) ¶ 21,874 (N.D. Ill. 1983); *Strobl v. New York Mercantile Exchange*, 561 F. Supp. 379 (S.D.N.Y. 1983); *Gonzales v. Paine, Webber, Jackson & Curtis, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 21,615 (S.D.N.Y. 1982); *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kansas 1979); *Poplar Grove Planting & Refining Co., Inc., v. Bache, Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Hofmayer v. Dean, Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978); *Poncy v. Shearson Lehman Bros., Inc.*, 20 Sec. Reg. L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987); *Rupert v. Clayton Brokerage Co. of St. Louis*, 705 P.2d 988 (Colo. Ct. App. 1985); *Zimmerman v. Merrill Lynch*, 283 S.E.2d 639 (Ga. Ct. App. 1981); *Sinclair & Co., Inc. v. Gurule*, 757 P.2d 225 (Idaho Ct. App. 1988); *Paine, Webber, Jackson, & Curtis, Inc. v. Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981); *WestLake v. Abrams*, 504 F. Supp. 337 (N.D. Ga. 1980); *Singer v. Clayton Brokerage Co. of St. Louis, Inc.*, 620 S.W.2d 720 (Tex. Ct. App. 1981); *Haines v. First Commodity Corp. of Boston*, [1980-82 Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.W.2d 557 (1978); *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637 (Tex. 1977).

provisions of Sections 4b and 4c of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, would probably preempt state law otherwise governing the conduct proscribed by those provisions, but that a savings clause appended to Section 4c of the statute precluded such preemption. *Rice v. Board of Trade,* 331 U.S. at 255.

In 1974, Congress amended the CEA by enacting the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (the "CFTC Act"). Section 402(c) of the CFTC Act, 88 Stat. 1413, repealed the savings clause which compelled the Court's conclusion, in the *Rice* case, that the Commodity Exchange Act did not preempt state law. That and other changes in the CEA resurrected the issue of preemption of state law by the CEA.

Since 1974, the issue of preemption has been discussed in numerous reported decisions,[8] which have, not unexpectedly, resolved the issue in disparate ways. *Compare, e.g. Kotz v. Bache Halsey Stuart, Inc.,* 685 F.2d 1204 (9th Cir., 1982) (no preemption); *Haines v. First Commodity Corp. of Boston,* [1980-82 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980) (CEA preempts state law); *Bache-Halsey-Stuart, Inc. v. Hunsucker,* 248 S.E.2d 567 (1978) (CEA preempts state statutory law but not common law); and *Poncy v. Shearson Lehman Bros., Inc.,* 20 Sec. Reg. & L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987). (CEA preempts state common law fraud claims based on negligence and breach of fiduciary duty and preempts state blue sky law).

The issue of preemption is recurrent principally because the remedies which Congress prescribed for conduct violative of the CEA limit persons injured by such conduct to a recovery of actual damages, *see* 7 U.S.C. §§ 18, 25, whereas the remedies for such conduct available under state law (to the extent that it is

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[8] See Note 7, *supra.*

not preempted by the CEA) typically permit the recovery of punitive or, in some instances, treble damages. *See, e.g. Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 861 F.2d 172 (actual damages of $7,923.50 awarded for violation of CEA, common law breach of fiduciary duty, punitive damages of $400,000.00 awarded under state law); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984) (actual damages of $21,942, punitive damages of $275,000 awarded under state law); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982) (punitive damages of $350,000 upheld under state law theory of recovery) *DeRauce, Inc. v. PaineWebber, Jackson & Curtis, Inc.*, 18 Sec. Reg. & L. Rep. (BNA) 775 (E.D. Wisc. 1986) (punitive damages of $20.5 million awarded under state law theory of recovery); *Singer v. Clayton Brokerage Co. of St. Louis*, 620 S.W.2d 720 (Tex. Ct. App. 1981) (treble damages recoverable under Texas Deceptive Trade Practices Act). To the extent that a defendant in a civil action predicated on conduct regulated by the CEA is successful in persuading the court in which the action is pending that the CEA preempts state law, that defendant markedly lowers the level of its exposure to a damage award. Consequently, it is reasonable to anticipate that the issue of preemption of state law by the CEA will continue to be raised by litigants and will continue to consume time and attention of the courts until it is definitively resolved by this Court.

The volume of private litigation arising out of commodity futures transactions is substantial.[9] Given recent disclosures of investigations into trading practices on the Chicago Board of

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[9] During 1986 and 1987, Commerce Clearinghouse reported decisions in 133 private civil actions in state and federal courts arising out of commodity futures trades. [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH), 1986-1987 Case Table. Although the Administrative Office of the United States Courts does not maintain a separate category for cases involving commodity futures trading, its records indicate that 6,080 civil cases involving securities, commodities, or exchanges were filed during 1986 and 1987. Annual Report of the Director of the Administrative Office of the United States Courts.

Trade and the Chicago Mercantile Exchange[10], that volume can only be expected to increase in the foreseeable future.

Congress has, of course, made an effort to relieve the burden of such litigation from the courts by establishing an administrative reparations procedure. *See* 7 U.S.C. § 18; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 384-386 (1982). While that procedure is actively utilized, the prospect of recovery of an award of punitive damages based on state law operates as an incentive to injured parties to resort to the courts to resolve their claims. As the history of this case illustrates,[11] such litigation is frequently protracted simply because of the presence of a claim for punitive damages.

Given the inconsistent ways in which the question of preemption has been answered to date, it is clear that a definitive resolution of the issue by this Court is warranted. Such a resolution will, of course, relieve the lower federal courts and the state courts of the need to repeatedly examine the question. If the question is resolved favorably to petitioner in this case, it will encourage claimants who would otherwise resort to the courts to rely on the expertise of the CFTC to resolve their disputes in administrative, rather than judicial, proceedings.

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[10] Jackson and Ricks, Cozy Ties: *Futures Propes Test Resolve of Congress to Deal with Traders,* Wall St. J., Feb. 2, 1989, at 1, Col. 6; Bailey and Rose, *Chicago Futures Investigation Targets Traders in S & P's 500 Stock-Index Pit.,* Wall St. J., Jan. 27, 1989, at 15, Col. 1; *Fraud Inquiry Leaves Host of Clients Wondering if They were Victimized,* Wall St. J., Jan 26, 1989, at 6, Col. 1; McMurray, Ros, & Bailey, *Chicago Futures Inquiry Issues 250 Subpoenas,* Wall St. J., Jan. 25, 1989, at 3, Col. 1.

[11] This case was initially filed in the District Court in 1982. It was not tried until 1987. In the interim, vast amounts of discovery were taken, not so much to develop evidence of the events and actions which directly affected Respondent's account, but rather to develop evidence of other, similar misconduct by Mr. Rachlin which was then used to support the claim for punitive damages. At trial, most of the five days of testimony were devoted to such evidence.

### B. This Case Is An Appropriate Context In Which To Resolve The Questions Presented For Review.

In *Matthews v. Eldridge,* 424 U.S. 319 (1976) the Court held that in order to determine the procedures required to afford a defendant due process of law, it is necessary to weigh three competing interests: (1) the private interests that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest(s) through the procedures employed and the probability that increased procedures would lessen the risk of error, and (3) the Government's interest. *Id.* at 335. The principal difficulty in weighing these interests in private civil litigation is ascertaining what the Government's interest is in a particular case in order to weigh that interest. It is possible that, in a given case, the Government's interest may be in deterring and/or punishing conduct viewed as undesirable. *See,* Wheeler, *The Constitutional Case For Reforming Punitive Damage Procedures,* 69 Va. L. Rev. 269, 303-11 (1983). In other instances, the Government's interest may be in protecting participants in particular industries from, e.g., the economic havoc which may be wreaked by punitive damage awards. *See, e.g., International Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42 (1979) (punitive damages may not be recovered against labor union because of risk that financial resources might be impaired); *Gertz v. Robert Welch,* 418 U.S. 323 (1974) (because of chilling effect on speech, punitive damages in defamation cases may not be recovered unless proven by clear and convincing evidence). In many instances, the Government simply has not defined what its interest is. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988) (common law claim for bad faith refusal to pay insurance claim; no statutorily defined standard of conduct or sanction).

In this case, the federal government has clearly defined its interests in the conduct at issue. The CEA, as amended, provides a full panoply of remedies and sanctions for conduct, such as that at issue in this case, proscribed by Section 4b of the CEA, 7

U.S.C. § 6b. A person registered (as Clayton was) with the CFTC can be subjected to administrative, civil and criminal penalties for engaging in conduct like that at issue in this case. *See* 7 U.S.C. §§ 9 (administrative action to preclude trading on commodity futures exchanges, revoke registrations, and impose monetary penalties), 13(c) (criminal penalties of fines and imprisonment), 13 a-1 (civil actions to enjoin or restrain violations). Additionally, such persons may be forced to compensate those damaged by their conduct through administrative reparation procedures, *see* 7 U.S.C. § 18, or private civil actions, *see* 7 U.S.C. § 25; *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran,* 456 U.S. 353 (1982) (recognizing implied private rights of action for violations of the CEA).

The CEA provides specific procedures that must be followed in pursuit of such remedies and sanctions. *See, e.g.,* 7 U.S.C. § 9. It also prescribes the factors that must be considered in determining the amount of monetary penalties to be assessed for violations of the statute. 7 U.S.C. § 9a. Consequently, it is clear that Congress has already made a policy decision about what remedies and sanctions are appropriate for conduct of the type at issue in this case, and the procedures that should be followed in meeting out such sanctions and providing those remedies.

Moreover, we would submit that by preempting state law otherwise applicable to the conduct at issue, Congress has proscribed state governments from having any interest in the conduct at issue other than enforcement of the CEA.[12] Consequently, this case affords the Court with the opportunity to weigh all of the competing interests that must be accounted for in determining what procedural safeguards ought to be afforded defendants in civil actions in which punitive damages are sought.

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[12] Pursuant to Section 6d of the CEA, 7 U.S.C. § 13a-2(1), state officials are permitted to enforce the CEA, in some circumstances.

## CONCLUSION

The jury in this case was permitted to decide, based on a preponderance of the evidence, whether Clayton had engaged in (or was responsible for) conduct violative of the Commodity Exchange Act and determine both the remedy (to the victim) and the sanction (against Clayton) for that conduct. Before it reached its decision whether Clayton had violated the statute, the jury was presented with evidence of Clayton's wealth. When it was charged with determining what sanction should be imposed upon Clayton, it was instructed to consider that wealth, but was not furnished with any guidance, apart from Clayton's wealth, as to what sanction would be appropriate for the conduct charged.

The consequence of this process was that the jury levied a $400,000 fine against Clayton—a fine fifty times the amount of the damages the jury found to have been sustained by the Respondent. This fine was established in reliance upon principles of state law, notwithstanding that Congress has established a pervasive regulatory scheme which, from all indications, was intended to occupy the field to the exclusion of state law.

The writ should issue to permit this Court to consider whether such manifest disregard for the procedures, remedies and sanctions prescribed by Congress violated Clayton's rights under the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States or the Supremacy Clause of the Constitution.

Respectfully submitted,

Kenton E. Knickmeyer
Suite 3400
One Mercantile Center
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Petitioner Clayton
Brokerage Co. of St. Louis, Inc.

Of Counsel:

Mike W. Bartolacci
Thompson & Mitchell
Suite 3400
One Mercantile Center
St. Louis, Missouri 63101
(314) 231-7676

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312-WM

David T. Jordan,
Appellee,

vs.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judge John R. Gibson did not participate.

Petition for rehearing by the panel is also denied.

December 8, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 87-1312

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David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

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Submitted: January 13, 1988

Filed: October 17, 1988

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Before HEANEY, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

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HEANEY, Circuit Judge.

Clayton Brokerage Co. of St. Louis, Inc. (Clayton) appeals from the district court's judgment entered in accordance with a jury verdict awarding David T. Jordan compensatory damages of $7,923.50 and punitive damages of $400,000.00. We affirm.

## I. BACKGROUND

On June 30, 1980, Jordan established a commodities futures trading account with Clayton. Prior to that time, Jordan had traded in commodities futures with several other firms and had lost money. Jordan's account with Clayton remained dormant until December of 1980 when he placed a trade and lost $677.50. Six weeks later, Jordan called Martin Rachlin, a Clayton broker and the branch manager of Clayton's Kansas City office. After some discussion, Jordan gave discretionary control over the account to Rachlin. The account, however, was never formally listed as discretionary in Clayton's records.

Rachlin began placing trades in Jordan's account in earnest on February 3, 1981. By March 13, 1981, Rachlin had placed a total of 94 trades in the account and had lost $7,923.50. The trades generated approximately $5,292.00 in commissions. While Rachlin was placing trades in the account, Jordan questioned him about the short term trading strategy he appeared to be following and the losses incurred in the account. Rachlin assured Jordan that he was an experienced trader and that some short term trading was necessary to take advantage of market trends.

When the equity in Jordan's account was depleted, Jordan received a margin call and notice that no further trading could take place in the account until the call was met. Jordan then contacted Rachlin to complain. Rachlin falsely responded that the notice was the result of a computer error. Rachlin then transferred into Jordan's account a number of profitable trades he originally placed in other accounts in order to regain Jordan's confidence, bring the account out of deficit status, and further trade the account. Jordan was unaware of this action because the confirmation slips sent to him did not indicate that

the orders had been switched into his account.[1] Eventually, Jordan closed the account and brought an action in federal district court alleging misrepresentation in violation of the Commodities Exchange Act, 7 U.S.C. § 6(b), and breach of fiduciary duty under Missouri common law.

At trial, Jordan proceeded on the theory that his losses were a small portion of those caused by a larger "plan" pursued by Rachlin and encouraged by Clayton's failure to take measures against Rachlin despite its knowledge of his actions. Pursuant to this plan, Rachlin gained discretionary control over an account and failed to record that control as required by company policy. Rachlin then excessively traded the account, generating large commissions for himself and Clayton, while establishing no coherent trading strategy. Rachlin also engaged in order switching. Rachlin switched some profitable trades into accounts he opened and controlled under fictitious names. More commonly, however, Rachlin switched orders in an effort to retain the confidence of investors, often bringing their accounts out of a deficit status in order to further trade them and generate additional commissions. If the customer complained, Rachlin misrepresented his skill and assured the investor that future trading would be profitable. Finally, if an investor complained directly to other Clayton employees, the investor was informed that his or her account was not listed discretionary and that, therefore, the losses were the investor's responsibility.[2]

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[1] The evidence at trial also indicated that on several occasions Rachlin switched into other accounts profitable trades originally placed in Jordan's account. Overall, however, Jordan's account posted a small net gain as a result of the order switching.

[2] Prior to trial, Clayton brought a motion in limine to exclude much of the "plan" evidence Jordan intended to introduce. After extensive briefing on the issue and a half day of oral argument, the district court substantially overruled Clayton's motion to exclude the evidence. The court did, however, limit evidence concerning four other Clayton customers, each of whom claimed to be victims of the larger plan, by prohibiting detailed testimony about the customers' account statements and trading transactions.

The jury found for Jordan on both claims and awarded him $7,923.50 in compensatory damages and $400,000.00 in punitive damages. Clayton then brought a motion seeking a reduction of the punitive damages award or, in the alternative, a new trial. The district court denied the motion. Clayton appeals on two grounds: (1) that the punitive damages award is grossly excessive in relation to the actual damages, and (2) that the punitive damages award is the result of prejudice caused by improper admission of testimony detailing the larger plan.

## II. EXCESSIVENESS

Clayton argues that the punitive damages are plainly excessive. In particular, it cites the 50-1 ratio of punitive to actual damages as evidence of gross excessiveness. Clayton contends that under Missouri law, punitive damages in the range of 2-1 to 4-1 are reasonable. Jordan responds that the award is supported by the degree of malice shown and by Clayton's financial condition. Moreover, Jordan argues that the award is consistent with the punitive awards affirmed in *Kerr v. First Commodity,* 735 F.2d 281, 289 (8th Cir. 1984) (actual damages of $21,942.00 and punitive damages of $275,000.00) and *Wegerer v. First Commodity Corp.,* 744 F.2d 719 (10th Cir. 1984) (actual damages of $10,775.00 and punitive damages of $250,000.00).

We find *Kerr* instructive on this point. *Kerr* involved an action for commodities trading fraud against a commodities trading firm, brought pursuant to both federal law and Missouri state law. On appeal, the firm challenged the punitive award of $275,000.00 as excessive in light of the trial court's remittitur of actual damages from $75,000.00 to $21,942.00. This Court upheld the punitive award, stating:

> The degree of malice and the financial wealth of the defendant both are relevant in determining the proper amount of punitive damages. Missouri courts require a nexus between the wrong committed by the defendant and the

> amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. The jury has wide discretion in determining the amount of punitive damages, and that determination is not to be disturbed unless it is the product of bias or prejudice or is otherwise an abuse of discretion.

735 F.2d at 289 (citations omitted).

Thus, the fact that the punitive damages award in this case is significantly greater than the actual damages award does not, in itself, require reduction of the punitive damages. Rather, we must examine whether there is a sufficient nexus between the wrong committed by Clayton and the amount of punitive damages. *See Wheeler v. Community Federal Savings and Loan Assn.*, 703 S.W.2d 83, 88 (Mo. Ct. App. 1986) (upholding actual damage award of $500.00 and punitive award of $100,000.00 stating that "[t]he general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*").

In this regard, the district court stated in its Memorandum and Order:

> [T]he jury could have concluded reasonably that [Clayton] placed Martin Rachlin in a position where [Jordan] was encouraged to place his confidence in Rachlin; that Jordan was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence * * * placed in him resulting in substantial financial harm to [Jordan] and substantial financial gain to Rachlin and [Clayton]; that [Clayton] failed to supervise in any meaningful way Rachlin's handling of [Jordan's] account; that even when complaints about Rachlin were received, [Clayton] failed to investigate adequately; that [Clayton] ignored information it had that Rachlin was violating [its] regulations; and that because of [Clayton's] substantial net

District Court Memorandum and Order at 6-7.

We have independently reviewed the evidence presented at trial concerning Clayton's conduct and affirm the district court's finding that the evidence fully supports the punitive damages award. For example, we note that James W. Hanson, a broker with Clayton, testified that in 1979 and 1980, while he was branch manager of Clayton's Kansas City office, he investigated customer allegations that Rachlin engaged in discretionary and excessive trading in accounts listed as non-discretionary. As a result of the investigation, Hanson concluded that Rachlin "had been making unauthorized trades in [two] customer accounts." Transcript at 296. Moreover, he testified that he informed his superiors in Clayton's home office in St. Louis of his conclusion. Despite this information, Clayton relieved Hanson from his position as branch manager and promoted Rachlin to that position. Transcript at 183.

With respect to excessive trading, Leslie Jordan, an expert retained by Jordan, testified that of the 32 days on which Rachlin could have traded Jordan's account, the account was actually traded on 24 days. In total, 84 trades were executed, generating an average daily commission of $165.39.[3] The expert testified

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[3] The expert also testified that 70% of the trades in Jordan's account were "day trades." The expert stated that such trades are indicative of discretionary control of the account by the broker due to the extensive communication that would be required for the customer to engage in such trading. In addition, the expert testified:

> Q. What is the basic interest or objective of a person who's a speculator in the futures market?
>
> A. Hope to have trading profits that exceed your cost of doing business, which is your commissions.
>
> Q. Now, taking that interest or that objective and bearing it in mind, could the trading that you described here in Mr. Jordan's account in your testimony today meet or satisfy that objective?
>
> A. I think it is heavily weighed (sic) against that possibility. Part — because it was predominantly day trades, that means the only

that in order to simply pay the commissions the account would have had to generate profits of more than 182 percent per month. The record also contains testimony that Clayton normally received at least a portion of the trading commissions. Transcript at 408.

Concerning order switching, Martha LaQuey testified that shortly after she was fired by Rachlin, she met with Ralph E. Bradac, an employee with Clayton's compliance department in St. Louis, and informed him that Rachlin was engaged in order switching.[4] Transcript at 405. Bradac's deposition, parts of

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> profit that could be made was how much the market moved in that given day.
>
> The market moves in fixed limits. It can't go from $400 an ounce to $500 an ounce in a day. It can move from $400 an ounce to [$]410. If you are right, and bought early in the day when it was low and sold high, it still backs out how much you can possibly make in a given day. It must move more than the cost of doing commissions * * * .
>
> The problem with trying to make a profit with day trading is, that you got things stacked against you. First you have to overcome the commission cost, and then you have to have enough price move within the given time period to compensate for that and still give you a net overall profit.
>
> It's a technique that rarely produces a profit in speculative customer accounts that are paying full-commission rates.
>
> Q. Would you say that the trading in Mr. Jordan's account that has already been described was consistent with or was contrary to the basic interest of making a profit?
>
> A. I think having heavy concentration in day trades in a small speculative account, paying full commission, is a doomed strategy. The customer can't come out ahead. There are too many odds against him.

Transcript at 758-59.

[4] In contrast, Bradac's deposition reflects that the meeting did not occur until March 17, 1981, some four days after the last trade in Jordan's account and one day after Rachlin was fired.

which were read into the record at trial, indicates that he reported the conversation to Clarence Delbridge, then head of Clayton's compliance department. Bradac deposition at 127. In addition, the record establishes that even if Clayton had not been explicitly informed of the order switching, it had available to it computerized information from which it should reasonably have detected the order switching scheme. Delbridge deposition at 74-80; transcript at 300-05. Thus, the record contains ample evidence from which the jury could have concluded that Clayton knew Rachlin was engaged in the order switching scheme.

In sum, the record fully supports the district court's finding that Clayton's acts and omissions are sufficiently related to the injury suffered by Jordan to justify the punitive damages award.

## III. PREJUDICE

Clayton also argues that the punitive damages award resulted from prejudice caused by improper admission of evidence concerning the larger plan. Specifically, it contends that the evidence was improperly admitted because, under Federal Rules of Evidence 403 and 404, its probative value was far outweighed by its prejudical and confusing effect on the jury. In this regard, Clayton points out that the bulk of the contested evidence concerns events that occurred prior to the trading activity in Jordan's account which are irrelevant to Jordan's claims. Clayton also argues that the single limiting instruction given the jury concerning the plan evidence was insufficient to overcome the prejudice caused by its admission.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, oppor-

tunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has had occasion to apply Rule 404(b) in a situation very similar to the instant case. In *Kerr v. First Commodity Corporation of Boston,* 735 F.2d 281, 286-88 (8th Cir. 1984), we considered a challenge to the trial court's admission of testimony of customers who were not parties to an action against a commodities futures trader. The customers testified that the trader defrauded them in a manner similar to that alleged by the plaintiff.[5] We affirmed the district court's admission of the testimony, finding that the evidence was properly admitted on the issue of punitive damages to show knowledge, intent and absence of mistake on the part of the trader. *Id.; see also Wegerer v. First Commodity Corporation of Boston,* 744 F.2d 719, 724 (10th Cir. 1984).

Although admission of "other acts" evidence carries with it the potential to confuse the ultimate issues to be determined by the jury and to unfairly prejudice a party, we note that under Rule 404(b) the trial court "has the duty to balance the probative force of the evidence against any possible prejudicial effect it might have on the jury." *Kerr,* 735 F.2d at 286. Moreover, the balance struck by the trial court will be overturned on review only on a finding of abuse of discretion.

Our review of the record indicates that the district court carefully considered the evidence concerning the larger plan and admitted it to show knowledge, intent and absence of mistake on the part of Clayton. The record also discloses that the trial court limited in some respects detailed testimony concerning the larger plan. Accordingly, we hold that the trial court did not abuse its discretion in striking the balance that it did.

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[5] In addition, we also considered a challenge to the district court's admission of two prior consent decrees entered against the trader.

In addition, the record reflects that early in the trial, Clayton brought up the subject of a cautionary instruction. In response, the court requested Clayton to prepare such an instruction and offered to hear argument on the content of the instruction and when it should be given. From Clayton's subsequent silence on the issue, we can only conclude that it decided, as a tactical matter, to request the court to give the cautionary instruction only with the other instructions at the close of the case.[6] In any event, we cannot say that the trial court's failure to give, sua sponte, a cautionary instruction during the course of the proceedings constituted an abuse of discretion.

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[6] The record reflects the following exchange concerning the cautionary instruction:

> [Counsel for Clayton]: You advised us earlier, I believe it was in connection with the arguments on the motion in limine, that you would give to the jury a cautionary instruction dealing with the evidence of activities relating to the other customers, customers other than Mr. Jordan.
>
> We've looked at that Eighth Circuit case that has, I believe in the footnote, a cautionary instruction that was given in that case. If you wish, we would be willing to draft a proposed cautionary instruction for your review, or I guess we are asking whether you have drafted such an instruction, or just what we should do on that.
>
> I think we are getting more and more into that type of evidence. We assumed we would not ask for that until right before the other customers started coming on the stand. But we are already getting into evidence about other customers.
>
> I think Ms. LaQuey will undoubtedly testify about other customer's accounts, and so it may be that we would be requesting that fairly quickly.
>
> The Court: What I propose you do * * * is prepare the form of instruction that you wish that I give, show that to [plaintiff's counsel], let them look at it, and then if there is some disagreement about either the instruction or when it should be given, we can take it up at one of our numerous times away from the jury.

Transcript at 333-34.

## IV. CONSTITUTIONAL CHALLENGE

Finally, Clayton argues that the punitive damages award violates the due process and equal protection clauses of the United States Constitution. Specifically, it contends that jury instruction number four violated its due process rights because it set forth a preponderance of the evidence standard as the burden of proof for awarding punitive damages. Clayton objected to the instruction at trial and challenges the instruction on appeal on the ground that the punitive nature of the award requires proof beyond a reasonable doubt. In addition, Clayton contends that admission of evidence as to its net worth violated the equal protection clause because the evidence irrationally implies it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.

In essence, we understand Clayton's contentions to be grounded on *Bankers Life and Casualty Co. v. Crenshaw*, ____ U.S. ____, 56 U.S.L.W. 4418 (May 16, 1988). At the time Clayton filed its brief in this case, the Supreme Court had noted probable jurisdiction but had not yet decided *Bankers Life*.

In *Bankers Life*, the petitioner insurance company sought to challenge a jury verdict awarding the appellee 1.6 million dollars in punitive damages. The insurance company contended that the award violated the Eighth Amendment's prohibition of excessive fines. In addition, it claimed that the award violated the due process and the contract clauses. The Supreme Court, however, declined to reach the issues, concluding that they were not raised and passed upon in the prior state court proceedings. 56 U.S.L.W. at 4420.

Initially, we note that the equal protection claim raised by Clayton was not raised by the appellant in *Bankers Life*. Moreover, although the appellant in *Bankers Life* claimed that the punitive award violated the due process clause, the Supreme Court characterized the chief issue raised in the case as

"whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases." *Id.* Thus, it is clear that the constitutional challange to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in *Bankers Life*.

More importantly, however, Clayton cites no case other than *Bankers Life* in support of its constitutional claims. Contrary to Clayton's due process claim, punitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 371-72 (1970). (Harlan J. concurring).

Similarly, Clayton's equal protection challenge is without merit. Clayton argues that admission of evidence of its net worth improperly suggested it would be more appropriate to punish Clayton than to punish a defendant with a lesser net worth. Yet, the evidence was not admitted on the issue of whether to impose punitive damages, nor was the jury instructed to consider such evidence in that determination. Rather, the jury was instructed to award punitive damages only if it found in favor of Jordan on the compensatory claim and if it found Clayton's conduct was malicious. *See* Jury Instruction No. 12. Thus, admission of the evidence did not violate Clayton's rights under the equal protection clause.

Accordingly, we affirm the judgment of the district court.

ROSS, Senior Circuit Judge, dissenting.

I respectfully dissent from the opinion of the panel majority and instead would reverse and remand the case to the district court with directions to order a remittitur of at least $300,000 of the $400,000 punitive damages award. A remittitur is appropriate in this case for at least two reasons. First, the record discloses that Clayton Brokerage Services Company (Clayton) was at most negligent in failing to supervise and investigate Martin Rachlin's activities. The degree of malice exhibited by

Clayton does not justify the severity of the punitive damages levied against it.

Second, at a fifty to one ratio, the punitive damages award is so grossly excessive in relation to the actual damages that the award represents a plain injustice. The punitive damage award imposed in this case does not exhibit the requisite correlation to the injury inflicted and the cause thereof. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Cir. 1987).

Accordingly, I dissent from the majority opinion to the extent that it fails to find that the punitive damages award of $400,000 is excessive as a matter of law.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

David T. Jordan,
Plaintiff,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Defendant.

No. 82-1107-CV-W-9

**ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL**

Defendant asserts 37 separate grounds for granting its motion pursuant to Rule 50, Federal Rules of Civil Procedure, for judgment notwithstanding the verdict or, in the alternative, its motion pursuant to Rule 59, Federal Rules of Civil Procedure, for a new trial.

**Standards for Determining Motions for New Trial and Judgment Notwithstanding the Verdict**

Despite the jury verdict in favor of plaintiff, judgment may be entered in favor of defendant if that is the only reasonable conclusion. *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). A motion for judgment notwithstanding the verdict challenges the sufficiency of the evidence to support the jury's verdict. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 194 (1940). In deciding whether to grant

defendant's motion for judgment notwithstanding the verdict, the Court should consider the evidence in the light most favorable to plaintiffs, assume that all conflicts in the evidence were resolved by the jury in favor of plaintiff, assume as proved all facts which plaintiff's evidence tends to prove, and give plaintiff the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977). The Court may not consider the credibility of the witnesses or the weight of the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp,* 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied,* 460 U.S. 1080, 103 S.Ct. 1767 (1983).

While a motion for judgment notwithstanding the verdict is addressed to the sufficiency of the evidence, a motion for a new trial invokes the discretion of the Court by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust. *Montgomery Ward & Co.*, 311 U.S. at 251, 61 S.Ct. at 194. The granting of a new trial rests within the discretion of the trial court. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972). A new trial should be ordered where the verdict was against the weight of the evidence or to prevent a miscarriage of justice. *Day v. Amax, Inc.*, 701 F.2d 1258, 1262 (8th Cir. 1983). A new trial should not be granted merely because the Court feels that another result was more reasonable. *Fireman's Fund Insurance Co.*, 466 F.2d at 186.

**Application of These Standards to Defendant's Motions Judgment Notwithstanding the Verdict**

Viewing the evidence in the light most favorable to the plaintiff and affording the plaintiff all reasonable inferences to be drawn from the evidence, a reasonable jury could have found in favor of the plaintiff. Therefore, defendant's motion for judgment notwithstanding the verdict is denied.

**Motion for New Trial**

Defendant argues that it should receive a new trial because 1) the verdict is excessive and contrary to the clear weight of the evidence; and 2) the excessive verdict resulted from erroneous admission of evidence relating to other customer accounts which were unrelated to plaintiff's account.

On November 24, 1986, the jury returned a verdict in favor of plaintiff and against defendant for actual damages in the amount of $7,923.50 on two counts submitted to it, i.e., plaintiff's claim for fraudulent misrepresentation under the Commodity Exchange Act, 7 U.S.C. §§ 1-24, and plaintiff's claim for breach of fiduciary duties under the common law of the state of Missouri. In addition to the actual damages awarded on the breach of fiduciary duties claim, the jury assessed punitive damages in the amount of $400,000. Defendant argues that the punitive damage award was excessive.

Because the excessiveness issue arises with respect to the state law claim, Missouri law governs. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 477 (8th Cir. 1977) (the damage award may not exceed "that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim."). *See also Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150-51 (8th Cir. 1984).

In Missouri, "[g]ranting a new trial on the ground of excessiveness of the verdict is equivalent to granting a new trial on the ground that the verdict is against the weight of the evidence.

Both involve the power of the trial court to weigh the evidence." *Pisha v. Sears Roebuck & Company,* 496 S.W.2d 280, 284 (Mo. Ct. App. 1973). *See also Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189, 191 (Mo. 1951); *Wisner v. S.S. Kresge Company*, 465 S.W.2d 666, 670 (Mo. Ct. App. 1971).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the future. *Wisner,* 465 S.W.2d at 669.

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

*Id.* (citations omitted).

In *State ex rel. St. Joseph Belt Ry. Co. v. Shain,* 341 Mo. 733, 108 S.W.2d 351 (Mo. 1937), the Court quashed its writ of certiorari to the Kansas City Court of Appeals thereby letting stand the lower court opinion that $4,000 punitive damages was not disproportionate to the actual damage award of $1. The Supreme Court quoted with approval the following from the opinion of the Kansas City Court of Appeals:

> *While it may be true that ordinarily a verdict for punitive damages should not be altogether disproportionate to the amount of actual damages returned,* yet, in this case, the verdict for actual damages of $1 only was returned under the instructions of the court, for the reason of plaintiff's inability to introduce competent evidence of greater damages; and therefore the actual damages assessed furnish no proper guide for the amount of the punitive damages to be returned. Especially is this so as there is am-

> ple evidence in the record justifying a liberal award of punitive damages, and the inferences therefrom should not be limited and restricted by an arbitrary assessment of actual damages.

*Shain,* 108 S.W.2d at 365 (emphasis added).

In later cases, Missouri courts have cited *Shain* for the proposition that the punitive damages awarded must have some reasonable relation to the injury inflicted on the plaintiff. *See, e.g., Wisner,* 465 S.W.2d at 669 and *Holcroft v. Missouri-Kansas-Texas R. Co.,* 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). "The general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*" *Wheeler v. Community Federal Savings & Loan,* 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) (emphasis in original).

Based on the foregoing, Missouri does not require a direct proportional relationship between the actual damages awarded and the amount of punitive damages. However, Missouri does require that there be "some reasonable" relationship between the injury inflicted on the plaintiff and the amount of punitive damages.

In determining whether $400,000 is "altogether disproportionate" to the injury inflicted on the plaintiff:

> [A] review of the many cases awarding exemplary damages discloses that a hard and fast rule for the measuring of such damages cannot be declared. Each case turns more or less upon its own peculiar facts. The character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant are elements which should be taken into consideration in awarding damages of this character [citation omitted], and the amount may be such as would serve to deter the occurrence of like acts in the future.

*Wheeler,* 702 S.W.2d at 87 (quoting *Sperry v. Hurd,* 267 Mo. 628, 185 S.W. 170, 174 (1916)).

The amount of punitive damages necessary to punish and deter cannot be precisely measured.

> Necessarily, the amount of punitive damages to effect punishment and determent can not be measured with mathematical preciseness. But this does not mean that juries have carte blanche in awarding punitive damages. Attendant circumstances, including mitigating as well as aggravating circumstances, must be taken innto consideration, and the amount must be equated to the degree of malice, criminality or contumely characterizing the actor's conduct for which punishment or determent is deemed necessary.

*Pisha,* 496 S.W.2d at 284-85.

The financial worth of the defendant is an important factor for the jury to consider in arriving at an approximate punitive damage award. "Punitive damages have often been referred to as 'smart' money and it takes only slight consideration to realize that an amount of damages which might 'smart' one defendant might be entirely inconsequential to another." *Wisner,* 465 S.W.2d at 669-70.

Here, the jury could have concluded reasonably that defendant placed Martin Rachlin in a position where plaintiff was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence plaintff placed in him resulting in substantial financial harm to plaintiff and substantial financial gain to Rachlin and defendant; that defendant failed to supervise in any meaningful way Rachlin's handling of plaintiff's account; that even when complaints about Rachlin were received, defendant failed to investigate adequately; that defendant ignored information it had that Rachlin was violating defendant's regulations; and that because of defen-

dant's substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by defendant in the future. As in *Shain,* the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not "altogether disproportionate" to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

Defendant's argument that the punitive damages awarded were so large as to indicate an improper motive on the jury's part requires that defendant demonstrate some error ocurred during the course of the trial that caused the jury to ignore the evidence and instructions. *Parks v. Consolidated Aluminum Co.*, 679 S.W.2d 348, 352 (Mo. Ct. App. 1984). Defendant argues that evidence about the complaints of other customers of Martin Rachlin and evidence about the manner in which Rachlin handled other customers' accounts was irrelevant and unfairly prejudiced and confused the jury. Defendant argues that the cumulative effect of plaintiff's other bad act evidence caused the jury to award $400,000 in punitive damages.

I was concerned during the trial that if plaintiff called all of the witnesses scheduled, the cumulative effect of plaintiff's "other account" evidence might deprive defendant of a fair trial. However, now that the trial is completed, I do not believe that defendant was deprived of a fair trial as a result of the admission of that evidence. Plaintiff's scaled down presentation of evidence about other accounts plus the instructions to the jury avoided the unfairness of excessive other acts evidence. Therefore, defendant has failed to show that anything happened during the trial that would have caused the jury to ignore the evidence and the instructions in awarding punitive damages.

For the foregoing reasons, it is hereby ORDERED that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are denied.

/s/ D. Brook Bartlett
United States District Judge

Kansas City, Missouri

February 5, 1987.

Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1483

In The

# Supreme Court of the United States

October Term, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

*Petitioner,*

v.

DAVID T. JORDAN

*Respondent*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF IN OPPOSITION TO CERTIORARI

William C. Partin
Attorney of Record
Matt Partin
Partin & Partin
1310 Carondelet Drive
Suite 330
Kansas City, Missouri 64114
(816) 942-7880
*Attorneys for Respondent*

April, 1989

Kwik Kopy Printing, 7833 State Line Road, Kansas City, Missouri (816) 444-6133

155 pp

## QUESTIONS PRESENTED

Respondent is not satisfied with Petitioner's statement of the questions presented. In accordance with Supreme Court Rule 34.2, Respondent states the following questions which were overlooked by Petitioner and must be taken up before Petitioner's questions.

**A. WAS THE PETITION FOR CERTIORARI TIMELY FILED UNDER SUPREME COURT RULE 20.4?**

**B. CAN CLAYTON BE GRANTED CERTIORARI ON QUESTIONS AND ISSUES THAT IT HAS NEVER PREVIOUSLY RAISED (OR HAS EXPRESSLY WAIVED) IN THE COURTS BELOW: QUESTION 1, THE 8TH AMENDMENT EXCESSIVENESS ISSUE; QUESTION 3, THE DUE PROCESS/EQUAL PROTECTION BIFURCATION ISSUE; AND QUESTION 4, THE COMMODITY EXCHANGE ACT PREEMPTION ISSUE?**

C. (a) DOES THE 7TH AMENDMENT PROHIBIT THIS COURT FROM REVIEWING ANY QUESTION INVOLVING THE SIZE OF A JURY'S DAMAGES AWARD, AND IF NOT, (b) WERE THE FRALOFF AND SUCCEEDING CASES - WHICH HELD TO THAT VERY EFFECT - WRONGLY DECIDED, AND (c) MUST THEY NOW BE OVERRULED?

D. (a) DO THE PROHIBITIONS AND PROTECTIONS OF THE 8TH AMENDMENT'S EXCESSIVE FINES CLAUSE EXTEND TO THE STATES AND THEIR CITIZENS THROUGH THE 14TH AMENDMENT'S DUE PROCESS CLAUSE, AND IF NOT, (b) IS A CASE REQUESTING REVIEW OF A JURY'S PUNITIVE DAMAGES AWARD AN APPROPRIATE VEHICLE FOR MAKING SUCH AN EXTENSION, ESPECIALLY IN LIGHT OF THE LONG LINE OF DECISIONS BY THIS COURT CONFINING THE 8TH AMENDMENT'S REACH TO CRIMINAL MATTERS?

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## STATEMENT OF CASE

Respondent is not satisfied with Clayton's Statement because it presents a grossly distorted picture of the case through extensive misstatements or omissions of fact and makes what Clayton knows are false statements in an effort to hide the failure to raise questions 1, 3 and 4 in the Courts below. Therefore, pursuant to Supreme Court Rule 34.2, a correct Statement follows.

### Parties And Claims

Plaintiff David T. Jordan, a retired accountant in his 70's, sued Defendants Clayton Brokerage Company and Martin Rachlin, the Manager of and a broker in the Kansas City office, where Plaintiff had an account (Rachlin had, unknown to his own counsel and everyone else, taken bankruptcy prior to the filing of the suit and eventually had to be dismissed). The gist of the claims submitted to the jury was that Jordan

had been caught in Clayton's longstanding and large scale plan to defraud customers. The first claim - a Merrill Lynch v. Curran implied cause - was for misrepresentation and required the jury to find that Rachlin induced Jordan to give up control over his account by falsely representing that the account would be traded pursuant to certain stated strategies, when Rachlin knew that the account would be handled according to the plan. Instruction No. 8. The second claim - a Missouri common law claim - was for breach of fiduciary duties and required the jury to find that Mr. Jordan's account was actually handled "in accordance with a plan designed to produce commissions and profits through excessive trading and switching of orders". Instruction No. 9. Having made the findings required by each instruction, the jury found Mr. Jordan's actual damages to be $7,923.50 and assessed punitive damages of $400,000.00. Judge

Bartlett found that the $400,000 award was proportioned to the malice in Clayton's conduct and to Plaintiff's injury and was within Clayton's ability to pay, and the Eighth Circuit affirmed those findings. Jordan, 861 F.2d at 174-77.

**Pre-Trial Events**

Though suit was filed in December 1982, trial did not take place until November 1986. In that time the case was transferred from Judge Bartlett to Senior Judge Oliver to Judge Bartlett, each time at the judge's instance. Orders 11-30-83, 5-6-85. After (a) ending the first trial with jury selection because he felt he could not rule the admissibility of certain FRE 404(b) evidence offered by Plaintiff to prove the existence of Clayton's plan unless it was all reduced to writing, Order 4-23-85, and (b) compelling the parties to reduce that evidence to writing by deposing the witnesses who would present that evidence

(which Plaintiff had chosen not to do because all the witnesses could appear at trial and their testimony was short and simple), id., Judge Oliver retransferred the case, citing his heavy workload. Another trial setting was not obtained until Fall 1986.

On September 25, 1986 Judge Bartlett held oral arguments on the plan evidence's admissibility and rejected Clayton's argument that there would be a "mountain" of such evidence (an argument repeated in Clayton's Petition, p.7, p.15, n.11), ruling that the evidence was admissible subject to various limitations, a ruling affirmed by the Eighth Circuit. Jordan, 861 F.2d at 176-77.

**The Trial And Evidence**

Trial began on November 10, 1986. The evidence showed that since 1979 Clayton, in the persons of Rachlin and various officers, including the heads of the Compli-

ance and Legal Departments, had carried out a plan for defrauding customers throughout the Midwest, the customers all having accounts in Clayton's Kansas City office. Infra. Testimony from Martha LaQuey, a former Clayton employee who had worked in the Kansas City office, from various employees and officers still at Clayton, and from Plaintiff and other customers, along with Clayton's own records showed that the plan operated as follows. First, the customer was induced to give control or "discretion" over the account to Clayton, by misrepresentations about the trading strategies that would be followed. E.g., T. 468-70, 796, 886-87. Second, though discretion had been obtained and would be exercised, making the accounts discretionary, all documentation would show the accounts as nondiscretionary; later when customers complained about Rachlin's trading of their accounts, Clayton officials would reject the complaints by

pointing to the "nondiscretionary" documentation and telling the customer that he had no basis for complaint because he was obviously doing all the trading himself. Jordan, 861 F.2d at 174. Third, the discretion would be used to trade the accounts excessively and without any rational strategy, for the sole purpose of generating commissions, id., 174, with 60% of the commissions going to Clayton and 40% to Rachlin. Fourth, the discretion was also utilized to switch orders (i.e., "open" positions or contracts which had not yet been matched with corresponding contracts to create a "trade") from one account to another, id.; by watching the markets' price movements it was possible for a broker to determine whether an open position would -if closed in the near future - produce a profit or a loss. Orders that would produce a profit were switched out of customers' accounts and into accounts that Rachlin

controlled through a confederate or owned under a fictitious name. Id., 174. Such orders could also be switched into the account of a customer who had suffered large losses due to the aimless excessive trading; the resulting profit would both placate the customer and allow more excessive trading. Id. Fifth, customer complaints to Rachlin were met by more misrepresentations about trading strategies and by assurances that those strategies would recoup past losses. Id. Finally, Clayton management protected Rachlin, covered up the plan and helped fend off customer complaints. Id., 174, 175-76, and infra. Illustrative of the coverup was the response of Clayton's management to "whistleblowing" by employees or ex-employees from the Kansas City office. When customer complaints in early 1980 prompted James Hanson (then-Manager of the K.C. office) to investigate Rachlin's conduct, conclude that Rachlin was defrauding custom-

ers and report that to management, Clayton removed Hanson as Manager and replaced him with Rachlin. Id., 175. And when in August 1980 Rachlin's ex-assistant, Martha LaQuey (fired by him for refusing to cooperate with the plan) reported the order-switching and the names of some Rachlin confederates to the #2 man in the Compliance Department (T.404-05) and he passed that on to the head of the Department (id., 176), nothing happened; six months later David Jordan's account would be caught up in the order-switching. Customer complaints had to be handled, too, as was exemplified by Ellen O'Connell's complaints. Though in mid-1980 she twice complained directly to Clayton's General Counsel that Rachlin took control of her accounts, was excessively trading them and ignoring her directions to stop (T.827-28, 835), and though Clayton's records showed extensive switching of orders into and out of her accounts (which could only

occur when the broker had control over the trading T.754-56), Rachlin was not stopped or disciplined and Compliance rejected her complaints by asserting that she, not Rachlin, did all the trading. T.844-45, 853-57; Ex.381. (Though a number of the customers who testified at trial, including Mrs. O'Connell, had complained to the CFTC, T.858, 904, no CFTC investigation ever took place.)

The tactics of management and Rachlin were extraordinarily successful; by the time Clayton took control over Mr. Jordan's account (January 1981) the plan had been in operation for two years. Jordan was induced by a series of misrepresentations about market trends, the planned trading strategy, and the profitability of that strategy to give discretion over his account to Clayton. Instr.8; T. 464-72. Though Clayton thus gained discretion over Jordan's account, its records continued to show the

account to be nondiscretionary. Ex.3. That notwithstanding, Rachlin immediately began trading at his discretion; in the five-six weeks he traded the account, his aimless excessive trading wiped out the approximately $7,000 balance, required Jordan to pay a $970 margin call and generated $5,292 in commissions. Jordan, 173, 175-76. An expert witness described the trading as following no strategy, except to make as many trades as possible, most of them day-trades, and stated that such an approach was "a doomed strategy" in which the "customer can't come out ahead", the heavy drain of commissions requiring a monthly profit of 182% merely to pay off the commissions and leave the account at a break-even point. Id., 175-76. That trading was supplemented and furthered by order-switching. Infra.

When Rachlin's excessive trading left the account with a negative balance after only two weeks, three orders that

would produce profits were switched into the Jordan account from other customers' accounts, wiping out the negative balance and allowing the trading to continue, Jordan, 173; the trading that followed generated an additional $2,300 in commissions. Days later two orders that would produce profits were switched out of Jordan's account and into an account Rachlin owned under the fictitious name "Xochilt Flores". Id., 173, n.1; Exs.15, 40d. None of that was known by Jordan because the trading records Clayton furnished to customers did not show that orders had been switched into or out of his account. Jordan, 173. It was known to Clayton management. Compliance Department employee Bradac learned of the "Flores" account well before the end of the trading in Jordan's account and again informed the head of the Department, but all that was concealed from Jordan. T.204-05, 547-49. All told, David Jordan lost $7,923.50.

That was a substantial injury to Jordan because he was retired and had a net worth of only slightly over $100,000 (T. 602); the loss represented some 7-8% of his net worth. (Clayton put Jordan's net worth into evidence, id., and later did not object but consented to admission of evidence of its net worth, id., 972; both figures were pertinent to calculation of any punitive damages award). The jury's verdict was returned on November 24, 1986.

**Preservation Of Questions 1, 3 and 4; Post-Trial Proceedings**

After the jury returned its verdict, Clayton's post-trial motions were duly filed. App., 15-26. They raised none of the issues presented here by Clayton's questions 1, 3 and 4 - those questions were not raised at all in the District Court, nor in the Eighth Circuit. Question 1's assertion that the punitive damages award was excessive under the 8th Amendment was eschewed by Clayton in both the Courts below in favor of

an argument based on Missouri's common law, App. 16-17 (post-trial motion); Jordan, 174-77; the Eighth Circuit expressly held that Clayton did not raise the 8th Amendment argument or any of the other arguments from Banker's Life. Jordan, 178.

Nor was question 3's argument about Clayton's net worth evidence raised either; as already noted, Clayton consented to its admission. Near the close of his case Plaintiff proposed to read to the jury Clayton's total assets and liabilities and its net worth ("stockholders' equity"). Clayton objected to the former but squarely agreed to the latter:

> "Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury".

T.972 (and see, 976; pages 972-76 are set out in the Appendix, 68-74). And when the figure was read to the jury, Clayton made no objection. T.1003; App.75. Only in the

instruction conference did Clayton first venture an objection to the net worth evidence, asserting that it was never admissible under the Equal Protection Clause because it might move the jury to more severely punish the defendant than "another defendant under similar circumstances who has a net worth that is less than this defendant's". T.1062, App., 76-77 (Clayton's objection in Instruction Conference). But Clayton did not move to strike the net worth evidence to whose admission it had agreed or request a withdrawal instruction, id., and though its objection anticipated Plaintiff's reference in closing argument to that evidence (id.), Clayton made no objection when that reference came. T.1097-98; App. 77-78. In its post-trial motions Clayton stuck with its Equal Protection argument, App.18 - and made no mention of bifurcation.

Id. That was likewise true in the Eighth Circuit (Brief of Appellant-Defendant, 45-56; App., 78). Jordan, 177-78.

Finally, preemption was never raised in the Courts below and Clayton does not say it was - though it strives to leave that impression, without actually saying so. Clayton admits that the issue was not raised in the Eighth Circuit (Petition, p.8, n.4) or "pressed" in the District Court (id., 6-7). It does attempt, by clever wordplay, to suggest that preemption was raised in its Answers by first pointing out that the Answers contained the standard boilerplate allegations that the Complaint fails to state a claim, and then stating that preemption was "the basis for that defense" (Petition, 6-7). But Clayton never says preemption was actually mentioned anywhere in any Answer, because it was not; if preemption was "the basis" for the "fails to state a claim" allegation, that was so only

in the scrivener's mind. Preemption is not mentioned in any document filed by Clayton in the Courts below and certainly not in the Answers (all the Answers are in the Appendix, 34-67; no Answer to the original Complaint was filed because Plaintiff amended it pursuant to FRCP 15(a) before an Answer was filed).

## ARGUMENT

The last few months' revelations of widespread fraud and criminality in the futures industry confirm what the facts of this case show: too often neither industry members or the CFTC will or can protect investors from fraud or aid them after they have been defrauded. For that reason, and others, Congress has long made sure that private damages actions are available to futures investors. The actual damages such actions provide can compensate investors; the punitive damages can do what Congress is increasingly coming to believe the CFTC

cannot - "punish violators severely enough to deter cheating" (Rep.English, Chairman of Subcommittee investigating futures industry). Yet Clayton's petition asks this Court to gut the remedy of private damages actions by radically changing punitive damages law or by finding preemption of all state common law torts. It would be hard to find a less propitious time for that.

Moreover, Clayton asks this Court for such extraordinary action even though it has failed to timely file its petition (Sec.I) and saw so little merit in the questions it now presents that it chose not to raise or even waived three of those four questions in the Courts below (Sec. II). And it ignored two other crucial questions: whether the 7th Amendment and the Fraloff line of cases prohibit this Court from reviewing the size of a jury's damages award (Sec. III), and whether the Excessive Fines Clause should be applied to the states

through the 14th Amendment (Sec. IV D 1). Thus, it is no surprise that, when considered on the merits, Clayton's questions do not present the requisite "special and important reasons" for certiorari (Secs. IV, V).

## I. Clayton's Petition Was Not Timely Filed Under Supreme Court Rule 20.4.

The Eighth Circuit's opinion was issued on October 17, 1988; because Clayton did not file the requisite "petition for rehearing" (instead filing only for rehearing en banc), its certiorari petition was due ninety days later under Supreme Court Rule 20.4. Though the order issued by the Eighth Circuit on December 8, 1988 does purport to deny a petition for rehearing and a petition for rehearing en banc, there simply was no petition for rehearing. In what is apparently an effort to protect unwary prospective certiorari petitioners who seek a rehearing en banc, but not a rehearing, the Eighth Circuit has recently

taken to issuing orders purporting to deny requests for rehearing and for rehearing en banc when only the latter has been requested. E.g., Jackson County Missouri v. Jenkins, No. 88-1228; sub nom. Jenkins by Agyei v. Missouri, 855 F.2d 1295 (8th Cir.1988) (petitions for rehearing en banc denied, 855 F.2d at 1295, 1318-19; when Clerk of Supreme Court indicated by letter to petitioners that petition was not timely because of failure to seek rehearing, Eighth Circuit issued second order denying requests for rehearing and rehearing en banc). Nonetheless, Clayton did not file a "petition for rehearing", which means that its certiorari petition was due on January 17, 1989 - and was thus nearly two months late.

## II. Clayton Has Failed To Raise Questions 1, 3 And 4 Of Its Petition At Any Previous Time In This Case And Has Waived Question 3 Of Its Petition In The District Court.

A. **Question 1.**

Until it filed its Petition here Clayton never raised the issue set out in question 1 of that Petition: excessiveness under the Excessive Fines Clause. That was not a mere omission on Clayton's part, but a deliberate tactical choice; rather than challenge the amount of the punitive damages award on constitutional grounds Clayton chose to challenge it on common law grounds.

Thus, in its post-trial motion Clayton asserted that the punitive damages award was excessive under the common law doctrines of simple excessiveness and/or bias, passion and prejudice. App., 16-17. No mention was made of the 8th Amendment. Id. Months later, Clayton did the same thing in the Eighth Circuit. Though its brief mentioned the Banker's Life case and the fact that probable jurisdiction had been noted, and cited the U.S. Law Week report which listed each of the questions raised by

Banker's Life, including the 8th Amendment question, (U.S.L.W. 3600, cited at p.46 of Clayton's "Brief of Defendant-Appellant"), the brief, like the post-trial motions, challenged the size of the award only on the two common law grounds. Id., 27-32 (simple excessiveness), 32-45 (bias, passion and prejudice). When Respondent's brief then pointed out that Clayton did not raise an 8th Amendment challenge, Clayton's reply brief did not demur. Accordingly, after it rejected the two common law challenges to the award, the Eighth Circuit specifically held that Clayton had never raised any of the issues presented by Banker's Life. Jordan, 861 F.2d at 178 ("Thus it is clear that the constitutional challenge to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in Banker's Life".) Finally, unlike the Banker's Life

petitioners, Clayton did not attempt to belatedly raise the 8th Amendment issue in its rehearing en banc papers. App., 27-31.

Clayton chose to rely on Missouri's common law rather than the 8th Amendment because it believed that it had a greater chance of success with the common law and, of course, knew that a victory on that ground in the Eighth Circuit would leave Plaintiff little chance of obtaining review in this Court. So, though it mentioned Bankers' Life in its brief by way of suggesting that punitive damages are in some disfavor, it carefully and deliberately refrained from raising any of the constitutional challenges it knew had been belatedly raised there. Jordan, 861 F.2d at 178.

**B. Question 3.**

Question 3 proposes that the Due Process and Equal Protection Clauses mandate a bifurcated trial in a punitive damages case and allow admission of evidence of the

defendant's net worth only in the second part of the trial. Yet, as Respondent's Statement of the Case has shown, Clayton (a) began the use of such evidence in Plaintiff's case by presenting evidence of his net worth (T.602), (b) expressly consented to admission of its own net worth figure, (c) never requested bifurcation of the trial, and (d) never raised question 3 in either of the Courts below. Statement, supra, pps. 13-14. Thus, Clayton not only failed to raise, but actually waived question 3.

**C. Question 4.**

Also already shown is that Clayton never raised preemption in the Courts below. Statement, pps. 15-16. That was a tactical choice, reflecting the belief that the issue lacked merit, as Clayton's Petition (6-7) grudgingly admits. Clayton had unsuccessfully raised the issue in a case similar to this one in Kansas City, O'Connell v.

Clayton, No. CV85-12755 (Jackson County, Missouri Circuit Court) (see, App. 32-33) and that defeat coupled with consistent rejections of the argument by Federal Courts - e.g., Patry v. Rosenthal & Co., 534 F.Supp. 545 (D.Kan.1982); Kotz v. Bache Halsey, 685 F.2d 1204 (9th Cir. 1982); Kerr v. First Comm.Corp., 735 F.2d 281 (8th Cir. 1984) - led Clayton to believe that there was no reason to raise the issue.

**Conclusion**

The failure to raise in the Courts below a question presented in a certiorari petition is ample ground for denial of review. E.g., Miree v. DeKalb County, 433 U.S. 25, 33-34 (1977); Tennessee v. Dunlap, 426 U.S. 312, 316 n.3 (1976). It is certainly ground for denial of certiorari here because Clayton deliberately chose not to raise or even waived the issues presented in questions 1, 3 and 4. Clayton must live with the consequences of its tactical choices and

cannot escape them by hiding the fact - as its Petition attempts to do - that it chose not to raise the issues. The unfairness of that ploy is manifest. Compounding that unfairness is the history of delay that permeates this case. Though Plaintiff's complaint was filed in December 1982, and though all parties were ready for trial in April 1984 at the first trial setting, the case was not actually tried until November 1986. By the time the post-trial motions were ruled, the case had been more than four years in the trial court. Then, arriving in the Eighth Circuit in early 1987, the case spent almost two more years there. Clayton should not now be allowed to extend the case for another year by raising here for the first time questions it chose not to raise or actually waived in the Courts below.

## III. The 7th Amendment Prohibits This Court From Considering Any Question Turning Upon The Size Of A Jury's Damages Award.

The 7th Amendment provides in part:

> "(N)o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

That clause has long been viewed as prohibitory in nature. E.g., Parsons v. Bedford, 3 Pet. 446; 28 U.S. 433, 447-48 (1830). Included among the kinds of review prohibited by the clause is that which Clayton requests in question 1: appellate review of the size of a jury's damages award. E.g., Railroad Co. v. Fraloff, 100 U.S.24, 31 (1879); Southern Ry. v. Bennett, 233 U.S. 80, 87 (1914); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933); Neese v. Southern Ry. Co., 350 U.S. 77 (1955). In order to provide such review, it will be necessary to overrule the Fraloff line of decisions, a course for which the 8th Amendment provides no support (see, Sec. IV D 2).

## IV. Missouri's Law Of Punitive Damages And Clayton's Questions 1-3; The Questions Present No Ground For Granting Certiorari.

### A. Missouri Law And Punitive Damages.

Before looking at Clayton's punitive damages questions, it is helpful to briefly review the law on which the jury's punitive damages award was based - Missouri's common law. It points up many of the flaws in Clayton's arguments.

In Missouri punitive damages grew out of compensatory damages. The early punitive damages cases held that malicious conduct removed the strictures governing compensatory damages, including the one limiting damages to the amount of the actual loss:

> "where a trespass is committed in a wanton, rude and aggravated manner indicating malice or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost . . . and even this may be exceeded to prevent a repetition of the act".

Walker v. Borland, 21 Mo. 289, 291 (1855) (emphasis added). For that reason punitive damages had an element of compensation, along with elements of punishment and deterrence; in the Supreme Court's words:

> "Where there are no circumstances of aggravation the damages should be compensatory only. Where, however, the act is aggravated and where there has been fraud, oppression, malice or gross negligence, a different rule is adopted and the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender".

Franz v. Hilterbrand, 45 Mo. 121, 123 (1869) (emphasis added). Thus, when in the mid-19th Century, a commentator began to argue in his treatise that punitive damages were criminal in nature - because, so he asserted, punishment was solely the criminal law's province (Greenleaf on Evidence) - the Missouri Supreme Court rejected that argument, turning to the rationale of the early cases which found an element of compensation in punitive damages:

> "But this point has been so firmly established, and so long settled contrary to this view, that it is no longer open to controversy. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender".

Buckley v. Knapp, 48 Mo. 152, 162 (1871) (emphasis added).

The early cases worked out a detailed and carefully designed series of requirements and rules for (a) proving liability for, and (b) calculating the amount of punitive damages, which are still followed today. Unlike some states which give a rather nebulous definition to "malice", see discussions in Smith v. Wade, 461 U.S. 30 (1983), Missouri precisely defines three different types and degrees of malice, ranging from malice-in-law, to legal malice, to actual malice. E.g., Proctor v. Stevens Employment Services, 712 S.W.2d 684, 686 (Mo.1986). In addition, Missouri re-

quires that the degree of malice needed to establish liability for punitive damages be higher than that needed to establish liability for the underlying tort. Proctor, 712 S.W.2d at 687.

The requirements and rules for calculating the amount of punitive damages (on which Clayton relied in its common law challenges to the punitive damages award) are no less detailed and precise than those for liability, and supply the guidelines which this Court has occasionally worried may be lacking in some other jurisdictions. For example, though the amount of the punitive damages award must, of course, be proportioned to the degree of malice, under Missouri law it must also be proportioned to the plaintiff's injury. Compare, St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351 (Mo. 1937) with Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). And to accomplish that the jury may use the simple objective

standard of what percent of the plaintiff's net worth the actual loss represents, e.g., Beck v. Dowell, 20 S.W. 209, 210 (Mo. 1892); Holcroft v. Mo-Kan-Tex Ry., 607 S.W.2d 158, 164 (Mo.App.1980) - as was done in this case, T.1097-98 (App. 77-78), where Plaintiff lost some 8% of his net worth - and may thus make sure that the punitive damages award does not take a disproportionate percent of the defendant's net worth (2% in this case). Furthermore, the amount of punitive damages must be fitted to the defendant's ability to pay, e.g., Comegys v. Chrysler Corp., 577 S.W.2d 873, 880 (Mo.App. 1980) which also may be measured by the objective standard of percent of net worth, as here. Like some jurisdictions which limit punitive damages awards to a particular percent of the defendant's net worth, e.g., Little v. Stuyvesant Life Ins. Co., 136 Cal.Rptr. 653, 663 (Cal.App. 1976), Missouri closely scrutinizes awards using that

standard. E.g., Lipari v. Volume Shoe Corp., 664 S.W.2d 953, 958 n.2 (and cases cited) (Mo.App.1984); Potter v. Milbank, 489 S.W.2d 197, 207 (Mo.1972). The best measures of both the fairness and the precision and clarity of Missouri's rules for calculation of the amount of a punitive damages award are that (1) though it undoubtedly had in hand Justice O'Connor's concurring opinion in Banker's Life, Clayton has not in any way challenged those rules as imprecise or vague, and (2) Clayton relied primarily on those rules in the Courts below. With that background in place, Clayton's punitive damages questions can now be considered, albeit, in an order slightly different from that followed by Clayton.

### B. The Due Process Clause Does Not Require That A Claim For Punitive Damages Under Missouri Law Be Proved Beyond A Reasonable Doubt.

Though Clayton's certiorari papers do not state it with any particularity or identify the constitutional provision it relies on, question 2 seems to invoke the rule that the Due Process Clause requires a matter that is criminal in nature to be proved beyond a reasonable doubt. E.g., In re Winship, 397 U.S. 358 (1970). That is the argument that was raised in cursory fashion in the District Court and Eighth Circuit; in the words of Clayton's Appellant's brief: "(b)ecause punitive damages are by their very nature designed to punish a defendant the only proper burden of proof is proof beyond a reasonable doubt as required by the Due Process Clause of the Fourteenth Amendment to the Constitution". Brief of Appellant-Defendant,45. The Eighth Circuit rejected that argument (supra, 178) and rightly so, for the argument is meritless in many ways.

First, as the Eighth Circuit held, a punitive damages claim under Missouri law simply does not pose the threat of loss of liberty that Winship requires and so is not criminal under Winship. The absence of that threat from damages claims is, as Justice Harlan's concurring opinion points out, the reason why traditional Anglo-American concepts of due process have required no more than that such claims be proved by a preponderance of the evidence. Winship, 397 U.S. at 371-72. Second, Clayton's argument rests on two implicit premises that are plainly wrong: (a) punitive damages are solely punishment, and (b) punishment is solely the province of the criminal law. As to the first of those premises, it has already been shown that in Missouri punitive damages grew out of compensatory damages and so retained an element of compensation. Supra, Sec. IV A. And the second premise, though once advocated by Professor Greenleaf

in the 19th century, has never been accepted by either Missouri law or United States law. E.g., Buckley v. Knapp, 48 Mo. at 162 (supra, Sec. IV A); United States v. Regan, 232 U.S. 37 (1914) ("Penal actions were never yet put under the head of the criminal law"; action for civil penalty need only be proved by a preponderance even though conduct in issue was made criminal by another statute); Helvering v. Mitchell, 303 U.S. 391 (1938) (punishment may be civil or criminal); Atlas Roofing Co. v. OSHC, 430 U.S. 442 (1977) (rejecting argument that OSHA proceedings were "criminal" because fines were penal). It is perfectly proper to impose punishment in civil proceedings and, as this Court held, "even severe civil sanctions" can rest upon "proof by a preponderance of the evidence". Herman & McLean v. Huddleston, 459 U.S. 375,390 (1983), citing Regan, supra. Finally, Clayton ignores the basic precept that the beyond a reasonable

doubt standard is "unique" and peculiarly tied to the criminal law, and thus cannot be "broadly or casually" applied outside that context. Addington v. Texas, 441 U.S. 418, 428 (1979). It is no exaggeration to say that in proposing the criminalization of punitive damages (and of the various torts which can underlie punitive damages claims), Clayton proposes a revolutionary change in our jurisprudence and legal system, a change that is simply not warranted.

Clayton's question 2 is and has been stated in such a cursory manner and without supporting authority because Clayton sees no real merit in the question. That is an accurate assessment in light of the Winship line of cases and the long history in Anglo-American jurisprudence of use of the preponderance standard in damages cases. Question 2 does not present the "special and important reasons" required for a grant of certiorari.

### C. Neither The Equal Protection Or Due Process Clause Requires Bifurcation Of Trials Where Punitive Damages Are Sought Or Precludes Admission Of Net Worth Evidence In Plaintiff's Case-In-Chief.

Question 3 and its bifurcation argument are an excellent example of the all too common tendency to unnecessarily constitutionalize even the simplest of procedural issues. The constitutional mandate of bifurcation that Clayton now seeks is completely unnecessary. In the first place, bifurcation is generally available for the asking in both federal and state courts. Clayton could have obtained bifurcation by requesting it under FRCP 42, and it is available upon request in Missouri's own Courts. Sec. 510.263 R.S.Mo. Clayton was not denied bifurcation because of the lack of a constitutional mandate; it simply did not think bifurcation was needed and did not request it. And in the second place, as is so clearly shown by Clayton's decision not

to request bifurcation and its agreement to admission of the net worth evidence in Plaintiff's case-in-chief, presentation of such evidence to a jury prior to its decision on liability is not a problem, let alone a problem of constitutional stature. Finally, neither the Equal Protection or Due Process Clause supports a bifurcation requirement. If the Due Process Clause did not support such a requirement in death penalty cases, e.g., McGautha v. California, 402 U.S. 182, 208-13 (1971) (and Gregg did not seem to read the Cruel and Unusual Punishment Clause as absolutely requiring bifurcation either, Gregg v. Georgia, 428 U.S. 153, 195), it certainly would not support it in punitive damages cases. Insofar as Clayton's reliance on the 14th Amendment rather than the 5th (a reliance presumably predicated on the fact that while the punitive damages claim was tried in a federal court, the claim and the jury's

decision of it rested wholly on state law) means that the proposed bifurcation requirement would reach trials in state courts as well as federal courts, there is a further obstacle to finding support for the requirement: federal-state comity. Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (1987). Question 3, like question 2, does not present the "special and important reasons" required for a grant of certiorari.

**D. The 8th Amendment's Excessive Fines Clause Does Not Provide For Review Of The Size Of Punitive Damages Awards; In Any Event The Award In This Case Was Not Excessive.**

In addition to the fact that it was never raised in the Courts below, Clayton's 8th Amendment argument suffers from two other fatal flaws. The first is that the Excessive Fines Clause does not apply to the states through the 14th Amendment (infra, subsec.1). The second is that even if it did

apply to the states, that Clause does not and should not apply to punitive damages awards (subsec. 2-4).

### 1. The Excessive Fines Clause Does Not Apply To The States.

While it is, of course, true that Respondent's punitive damages claim was tried in a federal court, the much more significant facts here are that the claim was stated and prosecuted under state law and that the jury's decisions regarding liability for and the amount of punitive damages were made under state law. The level of state involvement shown by those facts seems clearly sufficient to require Clayton to proceed as though this were a state case governed by the 14th Amendment's Due Process Clause. But that presents an obvious difficulty: this Court has never held that the prohibitions and protections of the 8th Amendment's Excessive Fines Clause extend to the states and their citizens through the 14th Amendment's Due Process Clause. E.g.,

Tribe, American Constitutional Law (2nd ed. 1988), 772-73. And the punitive damages issue that Clayton raises does not provide a vehicle for such an extension. For, as the following subsections show, the Excessive Fines Clause was never intended to and should not apply to punitive damages awards.

### 2. The Framers Had No Intention That The Excessive Fines Clause Would Provide For Judicial Review Of A Jury's Damages Awards.

As the preceding discussion of the 7th Amendment has shown, the Framers expressly limited judicial review of a jury's decisions of fact issues to the common law standards. A review of the standards extant at the time the Amendments were drafted shows clearly that the Framers had no intention or notion that the Excessive Fines Clause would provide for judicial review of a jury's damages awards - because there was no such review at that time. In the late 18th century in this country there was

neither a trial court remittitur practice or appellate review of a jury's damages awards. As Professor Wright has written (11 Wright & Miller, Federal Prac. & Proc., Sec. 2815, p.100) remittitur practice in this country goes back to Justice Story's Circuit opinion in Blunt v. Little in 1822. Blunt v. Little, 3 Fed.Cas. 760 (C.C.D.Mass. 1822). Though Justice Story's opinion thought there might have been a remittitur practice in England, this Court subsequently disavowed the Justice's reading of history. Dimick v. Schiedt, 293 U.S. 474, 483-85 (1935). Appellate review of a jury's damages award was likewise nonexistent in the late 18th century, and for long thereafter as Fraloff and the other cases cited above in Sec. III evince.

Given those facts, it is clear that the Framers did not in any way intend the Excessive Fines Clause to provide for judicial review of a jury's damages awards.

Such review was squarely at odds with the common law standards regarding civil jury trials that were expressly written into the 7th Amendment. Furthermore, all indications are that the Framers intended the 8th Amendment to apply solely to traditional criminal proceedings. E.g., In re Kemmler, 136 U.S. 436, 446-47 (1890); Weems v. United States, 217 U.S. 349 (1910); Ingraham v. Wright, 430 U.S. 651, 664-66 (1977). In sum, what Clayton's question 1 attempts to do is "wrench the Eighth Amendment from its historical context", just what this Court warned against and refused to do in Ingraham. Ingraham, 430 U.S. at 669.

### 3. There is No Reason To Provide For 8th Amendment Review Of Punitive Damages Awards.

To grant 8th Amendment review this Court will have to make a radical change in the law, holding either that the 8th Amendment is no longer confined to criminal matters or that a punitive damages claim is

somehow criminal in nature. Contemplation of those changes and their impact on the legal system leads directly to Ingraham's admonition against embracing "revolutionary" changes in the Amendment's reach. Ingraham, 430 U.S. at 671. In truth, there is no reason for such a change because here, as in Ingraham (430 U.S. at 670), the pertinent common law standards do (or can) provide sufficient direction and protection.

That is exemplified by Missouri's rules. They required that the amount of the award be proportioned to both Clayton's malice and Plaintiff's injury and provided the jury with information about Plaintiff's financial condition so that it could accurately gauge the extent of his injury. Furthermore, the rules required that the award also be fitted to Clayton's ability to pay and provided the jury with the net worth information needed to make that determination. Thereafter both the District Court and

Eighth Circuit followed those rules in reviewing the evidence to determine that the award had been properly proportioned to Clayton's malice and Plaintiff's injury and fairly fitted to Clayton's ability to pay. Jordan, 861 F.2d at 174-77. Clayton was and is so comfortable with Missouri's rules that it placed primary reliance on them in the Courts below and has not raised any challenge to them in this Court, even though Justice O'Connor's concurring opinion in Bankers' Life spelled out how such a challenge could be raised.

Ingraham's admonitions are well-taken; the proposed change in the 8th Amendment's reach is not warranted. Not only would Clayton's proposal violate Ingraham's warnings against "wrenching the 8th amendment from its historical context" and making "revolutionary" changes in the Amendment, it would make this Court the Court-of-Last-Resort in all punitive damages

cases. That title would undoubtedly carry with it a major increase in the cert-load and would require, in each case in which certiorari was granted, just the sort of exacting, time-consuming review of the trial record carried out by the Eighth Circuit in this case (which may explain the nearly two-year tenure of this case in the Eighth Circuit).

The better course is to do what Clayton did in the Courts below: rely on the states' common law rules. If other states have not drawn their rules as carefully and precisely as Missouri has, then the necessary changes can be made, either by state Courts or Legislatures, or if necessary, via the Due Process Clause.

### 4. The Punitive Damages Award Was Not Excessive Under Any Standard

Even if the 8th Amendment were to be changed to provide for review of punitive damages awards, there would still be no "special and important reason" for certior-

ari in this case, because the punitive damages award is not excessive under any standard.

Both the District Court and the Eighth Circuit carefully and closely reviewed the evidence to determine whether the punitive damages award was warranted or was excessive under Missouri's rules and both found the award warranted. Clayton does not now challenge those two reviews or the Missouri rules by which they were made. And while Clayton requests a third review -this time under the 8th Amendment - it has not even ventured to suggest how the rules for such a review would differ from Missouri's rules or would include factors not included in Missouri's rules.

Just what factors would be considered in an 8th Amendment review of a punitive damages award can be gleaned from cases in which this Court and other courts reviewed or imposed monetary sanctions akin to

punitive damages. E.g., United States v. United Mine Workers, 330 U.S. 258 (1947) ($3.5 Million in contempt sanctions); IBM v. United States, 493 F.2d 112 (2nd Cir.1973), cert. denied 416 U.S. 995 (1974). Those cases consider the monetary sanctions in light of factors such as (1) "the extent of willful and deliberate (conduct)", UMW, 303, (2) "the seriousness of the consequences of the (conduct)", id., (3) "the importance of deterring such acts in the future", id., and (4) "the amount of the defendant's financial resources", 304, or the defendant's "ability to pay", IBM, 115. Each of those factors is included in Missouri's rules. The first factor - "the extent of willful and deliberate conduct" - is the same as Missouri's rule that the award must be proportioned to the degree of malice in the defendant's conduct. E.g., Cook v. Housewirth, 254 S.W.2d 283, 286 (Mo.App. 1953) (punitive damages "are proportioned to the degree of

malice"). The second factor -"the seriousness of the consequences" - is the same as Missouri's rule that the award must be proportioned to the plaintiff's injury. E.g., Shain, supra. The third factor - "the importance of deterring such acts in the future" - is the element of deterrence which a Missouri jury (and the jury in this case, too) is adjured to consider by the instructional language regarding "deter(ring) Defendant and others from like conduct". M.A.I. 10.01; Jury Instruction 12. The final factor - "the defendant's financial resources" or "ability to pay" -is the same as Missouri's rule that the award must fit the defendant's ability to pay. E.g., Comegys, supra. And if a proportionality analysis of the type called for in Solem is needed, then that too was provided. Solem v. Helm, 463 U.S. 277, 292 (1983). The first of Solem's factors - the gravity of the offense - is covered by the foregoing discussion. The

remaining two factors - review of awards in similar cases - was provided by both the District Court and Eighth Circuit. Plaintiff cited to each Court three investment fraud cases from the Kansas City metropolitan area (Missouri and Kansas) involving similar conduct and injuries and producing punitive damages awards against brokerage firms of $250,000, $275,000 and $500,000 (plus $200,000 against a company officer). Wegerer v. First Commodity Corp., 744 F.2d 719 (10th Cir.1984) ($250,000); Kerr, supra, ($275,000); Heinen v. Lowell Listrom & Co., No. 83-1050-CV-W-8 (W.D.Mo.1985) ($500,000 against firm; $200,000 against officer). Jordan, 861 F.2d at 174; Brief of Plaintiff-Respondent, 27.

In short, Missouri's rules require consideration of each factor that might be included in an 8th Amendment review. Given that, even if 8th Amendment review were possible, it could not produce a result

different from that reached in the District Court and in the Eighth Circuit, especially when the requisite "great reliance" (UMW, 303) is placed on the District Court's decision. Thus, question 3 fails to present any "special and important reasons" for certiorari.

## V. The CEA Does Not Preempt State Common Law Actions And Clayton's Attempt To Raise That Issue Does Not Provide A Ground For Certiorari.

At a time when fraud in the futures industry seems more widespread than ever and the CFTC's need for help in enforcing the laws pertaining to that industry seems greater than ever, Clayton proposes that this Court should take away much of what Congress has long deemed one of the most effective ways of providing that help - private damages actions. Though there was never any substantial basis in the legislative history for the argument that the 1974 amendment (or later amendments) of the CEA impliedly preempted state common law tort

actions, and though Courts have regularly rejected that argument, following the path through the legislative history that was broken by Judge Friendly in Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) and by this Court in Merrill, Lynch v. Curran, 456 U.S. 353 (1982), Clayton has nonetheless raised the argument here, after eschewing it in the Courts below.

Clayton's argument does not really attempt to explain where the legislative history even suggests implied preemption of state common law actions, other than by making an allusion to the 1974 amendment. Nor does it attempt to show any conflict between state common law torts and the CEA, either by proving that "compliance with both federal and state (law) is a physical impossibility" or by proving that the "state (common) law stands as an obstacle to accomplishment and execution of the full purpose of Congress". Fidelity Fed. S. & L.

Assoc. v. Delacuesta, 458 U.S. 141, 153 (1982). Of course, Clayton makes no such attempts because the legislative history shows that Congress considered private damages actions, including those brought under state common law, to be important in "accomplishment and execution of the full purpose" of the CEA. Infra, Sec. A.

Instead Clayton merely asserts that preemption is an issue worthy of consideration here because (a) there have been "disparate resolutions" (p.13), (b) preemption is still being raised, (13-14), and (c) there is a large volume of "private" litigation over futures fraud (14-15). But not one of those assertions withstands scrutiny. Far from there being disparate resolutions, all Courts (except one Florida trial court) have reached the same resolution: the CEA preempts state regulatory statutes, but does not preempt state common-law tort actions. E.g., Kerr, supra; Kotz, supra; and see,

infra. The issue of preemption of state common law tort actions is settled and so is rarely raised anymore, as is evinced both by Clayton's decision not to raise it in the Courts below and by the dates in the long string of citations on page 12 of Clayton's Argument - the most recent cases are two years old (only three out of thirty) and the great majority are five-ten years old (it should also be noted that Clayton's citation string is egregiously padded; well over half of the cases do not deal with preemption of common law actions, but instead try to determine whether a particular statute is regulatory in nature). And if there is a substantial volume of private damages actions involving futures trading (which Clayton's statistics do not prove) that is a reflection of the prevalence of fraud in the industry and the CFTC's inability to deal with it alone.

As the next section shows, state common law tort actions were and are not preempted, because Congress deemed such private damages actions an effective means of enforcing the laws regarding the futures industry, and took care to preserve them as an aid to the CFTC. Such aid is all the more important today in light of the troubles in the markets and the increasing Congressional doubts about the CFTC's efficacy. Question 4 simply does not present any "special and important reasons" for certiorari.

### A. The CEA Preserves Common Law Tort Actions.

The 1974 amendment of the CEA marked a watershed in regulation of the futures industry. Congress was confronted with the dual needs of (a) ending infighting among federal and state regulatory agencies for power over the industry, and (b) substantially strengthening regulation of the industry. It chose to meet the first need by preempting regulatory statutes (e.g., state

Securities Acts) that were being used by various agencies to assert jurisdiction over the industry, and to meet the second need by vesting exclusive regulatory jurisdiction in the new CFTC, while preserving the private damages actions which it believed so effective in helping enforce the laws pertaining to the industry. Infra.

Preemption of regulatory statutes was a response to the "growing list of proposed and actual state regulations and laws" that state agencies were using in their regulatory efforts. House Report No. 93-975, 93d Cong., 2d Sess.,48. But that was as far as preemption went. Believing private damages actions to be valuable in strengthening enforcement of laws regarding futures trading - because the actions provided industry members "a significant incentive ... to obey the law" (Curran, 384) - Congress avoided preemption of the bodies of law that created such actions, including the

states' common law, viewing such preemption as unnecessary and contrary to the purpose of strengthening enforcement. Infra.

Reference to private actions abound in the 1974 amendment's history, as Judge Friendly detailed. Id., 308-15. They began in the House, in the remarks made by Chairman Poage in introducing the amendment, 119 Cong.Rec. 41333; Leist, 308, and continued throughout proceedings in that body. Leist, 308-09. In the Senate such remarks reached a high point during discussions in Committee about the fact that the House draft of Sec. 201 of the bill might be read as preempting not only regulatory statutes, but "all Court actions". Curran, 386 (quoting Senator Clark); Leist, 314 (same). House members involved in the drafting of Sec. 201 made clear that such sweeping preemption had not been their intent. Curran, 386; Leist, 315. Other members of the House and Senate made known to the Senate Committee their opposi-

tion to preemption of court actions, a number of those members specifically referring to common law actions or proposing preemption schemes that would clearly preserve such actions, e.g., Judiciary Chairman Rodino's proposal that preemption in the futures field be the same as that in the securities field. Hearings on S. 2485, S. 2578 and H.R. 13113, p.260; Curran, 387; Leist, 314-15. As a result, the Committee added to Sec. 201 the "savings clause", which was clearly accepted as preserving both the CEA's implied cause and "other court actions", Curran, 387, including state common law tort actions. E.g., Kerr, supra; Kotz, supra; Johnson, CFTC Jurisdiction, 25 Drake L.Rev. 61, 71 (Fall 1975) (article by Phillip Johnson, first Chairman of the CFTC).

Finally, after the bill was sent to the Senate floor, where Senator Curtis pointed out that previously-enacted Sec.

4(c) - purporting to preserve "any state law" - would conflict with H.R. 13113's attempt to preempt state regulatory statutes (which is what Clayton's Argument refers to, 13), the limited scope of preemption was reiterated. 120 Cong.Rec. 30464. Only Sec. 4(c) was deleted; the savings clause that had been added to Sec. 201 of the bill to preserve "all court actions" was left in place. Id.; Johnson, 25 Drake L.Rev., 69 (deletion of 4c directed only to preemption of "state regulatory authority").

The 1978 and 1982 amendments did not see any change in the Congressional belief that the CFTC needed help in enforcing the law or in the importance given to private damages actions. "Widespread fraud" in certain areas of the industry persuaded Congress that the CFTC needed even more help, which the 1978 amendment sought to provide by allowing state agencies to bring certain types of actions. Leist, 638 F.2d at

319. That trend continued in the 1982 amendment, and in reaction to Merrill Lynch's challenge to the implied cause in the then-undecided Curran case Congress reiterated its belief in the importance of private damages actions, by expressly writing such an action into the CEA. House Rep.No. 97-565, pps.56-57, reprinted in U.S. Code Cong. & Admin. News, 97th Cong., 2d session, pps. 3905-06; Mallen, 623 F.Supp. at 204-06.

From the foregoing history of the CEA the Courts that have dealt with preemption questions have all (with the exception of the Florida trial court) reached the same result: (a) the CEA does preempt regulatory statutes, e.g., Haines v. First Comm. Corp., CCH Comm. Fut.L.Rep., Sec. 21,088 (Mass. Super.Ct. 1980); Texas v. Monex Internat'l Ltd., 527 S.W.2d 804 (Tex. Civ.App. 1975); (b) the CEA does not preempt statutes which are non-regulatory, e.g., United States v. Brien, 617 F.2d 299, 309-10

(1st Cir. 1980); Bishop v. Commodity Exchange Inc., 564 F.Supp. 1557, 1563-5 (S.D.N.Y. 1983), and (c) the CEA does not preempt state common law claims, e.g., Kerr, supra; Kotz, supra; Mallen, supra; Patry, supra; Witzel v. Chartered Systems Corp., 490 F.Supp. 343, 347-48 (D.Minn. 1980); Jones v. B.C. Christopher & Co., 466 F.Supp. 345, 347 (N.D. Ill.1977). With the exception of the Florida trial court's decision (Poncy) the cases Clayton cites on Page 13 of its Argument as evidence of disparate resolutions of preemption are not at all disparate. Haines finds a state regulatory statute to be preempted, Hunsucker does the same while noting that common law damages actions are not preempted and Kotz holds that common law damages actions are not preempted.

## B. Question 4 Presents "Special And Important Reasons For Denying Certiorari.

The foregoing has shown that question 4 presents no "special and important reasons" for granting certiorari. But there are clearly special and important reasons for denying certiorari. The first can be found in the recent revelations of major criminal investigations in the Chicago and Kansas City futures markets, and also in the futures litigation figures Clayton cites in its Argument (14). What those revelations and figures show is that a problem Congress has long tried to resolve - fraud in the futures markets - is flourishing. While Clayton's perverse reasoning sees that as a ground for doing away with what Congress considered an important vehicle for enforcing the law - private damages actions - Congress would clearly not see it that way.

A second reason can also be found in the revelations of investigations and in the facts of this case: the inability of the CFTC to enforce by itself the laws relating to the futures industry. Although during the two-three year term of Clayton's plan to defraud its customers a number of those customers complained to the CFTC, nothing happened and the plan simply continued. That the CFTC does not have the resources or personnel to enforce the law by itself is nothing new; the CFTC has long admitted that, e.g., Leist, 638 F.2d at 321 (quoting CFTC's amicus brief) and, recognizing that, Congress has long provided for other means of enforcing the law, including private damages actions and help from state agencies. The legislative history of the CEA makes quite clear the importance Congress places on the availability of such other means of enforcing the law, especially

damages actions. That importance has surely increased in recent months, as Congress has become obviously dissatisfied with the CFTC.

Clayton could not have picked a worse time to reverse its earlier decision not to "press" the preemption issue. But even better timing would not make the issue certworthy, because nothing in the CEA, its legislative history or the caselaw supports preemption.

## VI. Conclusion.

Certiorari is not warranted in this case and should be denied. The numerous procedural defects and defaults attributable to Clayton are, by themselves, more than ample ground for denial of certiorari. Tactical choices made by Clayton in the Courts below led it to refrain from raising or to waive three of its four questions in those Courts; now that its tactical choices have failed, it should not be allowed to undo those choices and raise questions it

earlier decided not to raise. More grounds for denial can be found when Clayton's questions are considered on their merits. The radical changes Clayton seeks in Constitutional law, tort and damages law and futures industry law are very far from necessary or needed. And the result of such changes can be seen in what is now going on in the futures industry. Even when faced with the risk of private damages actions and punitive damages - which Clayton says pose such an awful threat - the industry is rife with fraud. To restrict or do away with private damages actions or punitive damages is to weaken or kill one effective deterrent to such conduct.

Respectfully submitted,

WILLIAM C. PARTIN
MATTHEW K. PARTIN
Suite 330
1310 Carondelet Drive
Kansas City, Missouri 64114
(816) 942-7880
Counsel for Respondent
David T. Jordan

# A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., | ) | |
| Defendant. | ) | |

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S EVIDENCE

Pursuant to Federal Rule of Civil Procedure 50, defendant Clayton Brokerage Company of St. Louis, Inc. ("Clayton") hereby moves the Court to direct the jury to return a verdict in favor of Clayton and against plaintiff at the close of plaintiff's evidence. In support of its motion, Clayton states:

1. Under the law and plaintiff's evidence, plaintiff has failed to prove any facts stating a claim upon which relief can be granted against Clayton.

2. Under the law and plaintiff's evidence, plaintiff has failed to prove that Martin Rachlin was Clayton's agent to make Clayton vicariously liable for the conduct of Martin Rachlin.

3. Under the law and plaintiff's evidence, plaintiff has failed to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

4. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

5. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

6. Under the law and plaintiff's evidence, plaintiff has failed establish that Clayton's alleged representations to plaintiff were false.

7. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

8. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

9. Under the law and plaintiff's evidence, plaintiff has failed to establish that he relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

10. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

11. Under the law and plaintiff's evidence, plaintiff has failed to establish that he used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

12. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

13. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton violated any fiduciary duty to plaintiff.

14. Under the law and plaintiff's evidence, plaintiff has failed to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

15. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

16. Under the law and plaintiff's evidence, plaintiff has failed to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

17. Under the law and plaintiff's evidence, the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

18. Under the law and plaintiff's evidence, plaintiff's failure to properly and timely object to Clayton's

actions or conduct constitutes a waiver of his right to assert liability against Clayton.

19. Under the law and plaintiff's evidence, plaintiff has failed to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

20. Under the law and plaintiff's evidence, plaintiff has failed to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

21. Under the law and plaintiff's evidence, plaintiff has failed to sustain the burden of proving that the damages claimed in plaintiff's Second Amended Complaint was a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

22. Under the law and plaintiff's evidence, plaintiff has failed to establish the amount of damages, if any, sustained by plaintiff, and any judgment in plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

23. Plaintiff's evidence in (sic) insufficient as a matter of law to meet Plaintiff's burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

24. Plaintiff's evidence is insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., | ) | |
| Defendant. | ) | |

DEFENDANT'S MOTION FOR DIRECTED VERDICT
AT THE CLOSE OF ALL THE EVIDENCE

Pursuant to Federal Rule of Civil Procedure 50, defendant Clayton Brokerage Company of St. Louis, Inc. ("Clayton") hereby moves the Court to direct the jury to return a verdict in favor of Clayton and against plaintiff at the close of plaintiff's evidence. In support of its motion, Clayton states:

1. Under the law and evidence of the case, plaintiff has failed to prove any facts stating a claim upon which relief can be granted against Clayton.

2. Under the law and evidence of the case, plaintiff has failed to prove that Martin Rachlin was clayton's agent to make Clayton vicariously liable for the conduct of Martin Rachlin.

3. Under the law and evidence of the case, plaintiff has failed to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

4. Under the law and evidence of the case, plaintiff has failed to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

5. Under the law and evidence of the case, plaintiff has failed to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

6. Under the law and evidence of the case, plaintiff has failed establish that Clayton's alleged representations to plaintiff were false.

7. Under the law and evidence of the case, plaintiff has failed to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

8. Under the law and evidence of the case, plaintiff has failed to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

9. Under the law and evidence of the case, plaintiff has failed to establish that he relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

10. Under the law and evidence of the case, plaintiff has failed to establish that he was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

11. Under the law and evidence of the case, plaintiff has failed to establish that he used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

12. Under the law and evidence of the case, plaintiff has failed to establish that he was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

13. Under the law and evidence of the case, plaintiff has failed to establish that Clayton violated any fiduciary duty to plaintiff.

14. Under the law and evidence of the case, plaintiff has failed to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

15. Under the law and evidence of the case, plaintiff has failed to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

16. Under the law and evidence of the case, plaintiff has failed to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

17. Under the law and evidence of the case, the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

18. Under the law and evidence of the case, plaintiff's failure to properly and timely object to Clayton's actions or conduct constitutes a waiver of his right to assert liability against Clayton.

19. Under the law and evidence of the case, plaintiff has failed to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

20. Under the law and evidence of the case, plaintiff has failed to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

21. Under the law and evidence of the case, plaintiff has failed to sustain the burden of proving that the damages claimed in plaintiff's Second Amended Complaint was a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

22. Under the law and evidence of the case, plaintiff has failed to establish the amount of damages, if any, sustained by plaintiff, and any judgment in

plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

23. Plaintiff's evidence in (sic) insufficient as a matter of law to meet burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

24. Plaintiff's evidence is insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., Defendant. | ) | |

DEFENDANT CLAYTON BROKERAGE COMPANY-OF ST. LOUIS, INC.'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Pursuant to Rule 50, Federal Rules of Civil Procedure, defendant Clayton Brokerage Company of St. Louis, Inc. hereby moves the Court to set aside the verdict and judgment entered on November 24, 1986, in favor of plaintiff David T. Jordan on his claims against defendant and to enter judgment in favor of defendant in accordance with its Motion for Directed Verdict at the Close of All the Evidence. In the alternative and pursuant to Rule 59, Federal Rules of Civil Procedure, defendant moves the

Court to order a new trial of plaintiff's claims against defendant. The reasons supporting this Motion, in addition to the reasons more fully set forth in the accompanying Memorandum in Support, are as follows:

1. The Court erred in failing to sustain defendant's Motion for Directed Verdict at the Close of All the Evidence for the reasons and on the grounds set forth in said Motion.

2. The verdict finding punitive damages against defendant in the amount of $400,000.00 is excessive and contrary to the clear weight of the evidence.

3. The verdict finding punitive damages against defendant in the amount of $400,000.00 is so grossly excessive, unreasonable and unwarranted under the evidence in this case as to show that it is the result of bias or passion and prejudice on the part of the jury in favor of plaintiff and against defendant.

4. In the event the Court finds the verdict for punitive damages was excessive but not so grossly excessive as to indicate bias or passion and prejudice on the part of the jury, defendant requests the Court to require plaintiff to remit the sum of $320,000.00 or, in the alternative, that the Court grant a new trial to defendant.

5. The Court erred in giving Jury Instruction No. 8 (Verdict director -- fraud) because it was not supported by the evidence.

6. The Court erred in giving Jury Instruction No. 9 (Verdict director -- breach of fiduciary duty) because it was not supported by the evidence.

7. The Court erred in giving Jury Instruction No. 4 insofar as that instruction purported to set forth the appropriate burden of proof for punitive damages because a preponderance of the

evidence standard violates the due process clause of the 14th Amendment to the United States Constitution.

8. The Court erred in giving Jury Instruction No. 12 because plaintiff failed to make a submissible case on punitive damages and for the reasons set forth in paragraph 7 above.

9. The Court erred in allowing plaintiff to read defendant's net worth to the jury because plaintiff failed to make a submissible case on punitive damages and because it violated the Equal Protection Clause of the 14th Amendment to the United States Constitution.

10. The Court erred in not granting defendant's motion for mistrial during plaintiff's case-in-chief concerning the evidence of commissions earned in another customer's account.

11. The Court erred in admitting over defendant's objections the testimony of Beverlee Peterson, James Hanson, the records custodians from the Kansas National Bank, the United States Post Office, and the Social Security Administration, Martha LaQuey, Wayne Lieser, Waldo Wiens, Elmer Beningfield, and Ellen O'Connell to the extent that said testimony related to trading activity that had no direct bearing or relationship to the handling of plaintiff's account.

12. The Court erred in overruling defendant's objections to plaintiff's exhibits 33, 34, 37, 38, 40, 41, 42, 43, 44, 45, 46, and such other exhibits that had no direct bearing or relationship to the handling of plaintiff's account.

13. The Court erred in not sustaining defendant's objections to plaintiff's repeated use of "other bad act"

evidence because the cumulative effect of such evidence was to deny defendant a fair trial.

14. The Court erred in denying defendant's Motion in Limine concerning "other bad act" evidence.

15. The evidence established as a matter of law that plaintiff failed to prove any facts stating a claim upon which relief can be granted against Clayton.

16. The evidence was insufficient as a matter of law to prove that Martin Rachlin was Clayton's agent to make clayton vicariously liable for the conduct of Martin Rachlin.

17. The evidence was insufficient as a matter of law to establish that Martin Rachlin was acting within the course and scope of his employment so as to make Clayton vicariously liable for his conduct.

18. The evidence was insufficient as a matter of law to establish that Clayton made misrepresentations to plaintiff concerning the manner in which his account would be traded.

19. The evidence was insufficient as a matter of law to establish that Clayton intended plaintiff to rely on its alleged representations concerning the manner in which plaintiff's account would be traded.

20. The evidence was insufficient as a matter of law to establish that Clayton's alleged representations to plaintiff were false.

21. The evidence was insufficient as a matter of law to establish that Clayton knew the alleged representations concerning the manner in which plaintiff's account would be traded were false.

22. The evidence was insufficient as a matter of law to establish that Clayton's alleged representations concerning the manner in which plaintiff's account would be traded were material.

23. The evidence was insufficient as a matter of law to establish that plaintiff relied upon Clayton's alleged representations concerning the manner in which his account would be traded.

24. The evidence was insufficient as a matter of law to establish that plaintiff was unaware that Clayton's alleged representations concerning the manner in which his account would be traded were false.

25. The evidence was insufficient as a matter of law to establish that plaintiff used ordinary care in relying on Clayton's alleged representations concerning the manner in which his account would be traded.

26. The evidence was insufficient as a matter of law to establish that plaintiff was damaged as a result of Clayton's alleged representations concerning the manner in which his account would be traded.

27. The evidence was insufficient as a matter of law to establish that Clayton violated any fiduciary duty to plaintiff.

28. The evidence was insufficient as a matter of law to establish that he was damaged as a direct result of any alleged breach of fiduciary duty by Clayton.

29. The evidence was insufficient as a matter of law to establish that Clayton's conduct violated 7 U.S.C. Sec. 6(b).

30. The evidence was insufficient as a matter of law to establish that any alleged violation of 7 U.S.C. Sec. 6(b) directly damaged plaintiff.

31. The evidence established as a matter of law that the acts and conduct of Clayton of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. The evidence was insufficient as a matter of law to establish that any act of Clayton was done with malice or reckless disregard of plaintiff's rights.

33. The evidence was insufficient as a matter of law to establish that Clayton authorized the acts of Martin Rachlin with respect to the trading in plaintiff's account.

34. The evidence was insufficient as a matter of law to sustain plaintiff's burden of proving that the damages claimed in plaintiff's Second Amended Complaint were a direct result of any acts or omissions by Clayton and not from some other cause for which Clayton is not liable.

35. The evidence was insufficient as a matter of law to establish the amount of damages, if any, sustained by plaintiff, and any judgment in plaintiff's favor, therefore, could be based only on guesswork, conjecture, surmise, or speculation.

36. The evidence was insufficient as a matter of law to meet plaintiff's burden of proof with respect to all elements necessary for recovery under the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

37. The evidence was insufficient as a matter of law to support a judgment in favor of plaintiff and against Clayton on the causes of action, if any, alleged in plaintiff's Second Amended Complaint.

WHEREFORE, defendant prays the order of the Court.

Defendant requests oral argument on this Motion.

/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant
Clayton Brokerage Company of St. Louis, Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 87-1312-WM
DAVID T. JORDAN
Plaintiff-Appellee
v.
CLAYTON BROKERAGE CO.
OF ST. LOUIS, INC.
Defendant-Appellant
Appeal from the United States District
Court for the Western District of Missouri
Western Division

**PETITION FOR REHEARING**
**EN BANC AND MEMORANDUM IN SUPPORT**

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**STATEMENT REQUIRED PURSUANT TO RULE 16(d)**

I express a belief, based on a reasoned and studied professional judgment, that the decision filed in this case on October 17, 1988, is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir.1987) and Morrill v. Becton, Dickinson & Co., 747 F.2d 1217 (8th Cir. 1984).

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Whether the award of $400,000.00 in punitive damages, which is more than fifty (50) times the award of $7,923.50 in actual damages, is grossly excessive, lacks any correlation to the injury inflicted or the cause thereof, and therefore must be remitted.

2. Whether appellant Clayton's rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution were violated by: (a) the imposition of punitive damages in an amount calculated on the basis of appellant Clayton's net worth and in the absence of any objective standard, (b) by the admission in evidence of Clayton's net worth on the issue of the amount of punitive damages to be awarded,

and (c) the imposition of punitive damages based on a jury instruction allowing punitive damages to be awarded on a mere "preponderance of evidence" standard rather than a "proof beyond a reasonable doubt" standard.

PETITION FOR REHEARING EN BANC

Clayton Brokerage company of St. Louis, Inc. ("Clayton") hereby petitions the Court pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 16 of the Eighth Circuit Rules of Appellate Procedure, for a rehearing en banc. The decision of the panel in this case is contrary to other decisions of this Court, thus requiring a hearing by the full Court to secure a uniformity of decisions. In addition, this appeal raises questions of exceptional importance not only to Clayton but to all defendants and potential defendants faced with unlimited claims for

punitive damages. Specifically, a rehearing en banc should be granted for the following reasons:

1. The panel's decision in this case is contrary to the prior decisions of this Court in Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir.1987) and Morrill v. Becton, Dickinson & Co., 747 F.2d 1217 (8th Cir.1984) and to prior decisions of the appellate courts of Missouri. The decision improperly permits a $400,000 punitive damages award, which was in excess of 50 times the actual damages award, to stand. That award was grossly excessive as a matter of law and lacked the requisite correlation to the injury inflicted and the cause thereof. As ably set forth in the dissenting opinion of Senior Circuit Judge Ross, the punitive damages award in this case should have been significantly reduced by remittitur.

2. The panel's decision improperly sanctions the violation of Clayton's Constitutional rights. Clayton's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution were violated by a jury instruction on punitive damages which required only a preponderance of the evidence and not proof beyond a reasonable doubt. Additionally, those rights were violated by the erroneous admission of net worth evidence. Such evidence erroneously implied to the jury that it was more appropriate to punish Clayton than other persons under similar circumstances who had lesser net worth. Moreover, the jury was given no standard whatsoever to use in its consideration of such evidence.

/s/ John W. Cowden
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE CIRCUIT COURT OF JACKSON COUNTY, MO.
AT KANSAS CITY

| | | |
|---|---|---|
| ELLEN O'CONNELL, Plaintiff, | ) | |
| vs. | ) | No. CV85-12755 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., Defendant. | ) | |

MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, TO DISMISS THE PETITION

Comes now Clayton Brokerage Company of St. Louis, Inc. ("Clayton") and moves, in the alternative, that the Court reconsider its Order denying Clayton's motion for summary judgment, or that the Court dismiss the Petition for failure to state a claim upon which relief can be granted.

As grounds for reconsideration, Clayton submits that the Court erred, as a matter of law, in concluding that the dismissal of Plaintiff's reparation complaint was for failure to prosecute, rather than for limitations. Furthermore, even assuming that the dismissal was based on Plaintiff's failure to prosecute, the

dismissal bars Plaintiff's claims, since it is not stated to be a dismissal without prejudice.

As grounds for its motion to dismiss, Clayton submits that Section 4b of the Commodity Exchange Act, 7 U.S.C. Sec. 6b, preempts state law that would otherwise govern the conduct alleged in the Petition. Consequently, the Petition fails to state a claim upon which relief can be granted.

Wherefore, Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court enter its order granting summary judgment in favor of Clayton or, alternatively, dismissing the Petition, with prejudice, for failure to state a claim upon which relief can be granted.

THOMPSON & MITCHELL
/s/ Kenton E. Knickmeyer
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants. | ) | |

SEPARATE ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its separate answer to plaintiff's Second Amended Complaint, states:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's Second Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to trade in the commodities future market, and

that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's Second Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's Second Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's Second Amended Complaint.

5. Denies each and every averment contained in paragraphs 5, 6, 7, 8, and 9 of plaintiff's Second Amended Complaint.

6. Denies each and every averment contained in the General Allegations of plaintiff's Second Amended Complaint not specifically admitted herein.

COUNT I

7. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's Second Amended Complaint.

8. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's Second Amended Complaint.

9. Denies each and every averment contained in Count I of plaintiff's Second Amended Complaint not specifically admitted herein.

10. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

11. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

12. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's Second Amended Complaint.

13. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

14. Further answering, Clayton Brokerage states that Count I of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

15. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's Second Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT II

16. No answer is required for Count III because it has been dismissed from this case.

COUNT III

17. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's Second Amended Complaint.

18. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's Second Amended Complaint.

19. Denies each and every averment contained in Count III of plaintiff's Second Amended Complaint not specifically admitted herein.

20. Further answering, Clayton Brokerage states that Count III of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's Second Amended Complaint.

22. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

23. Further answering, Clayton Brokerage states that Count III of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

24. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's Second Amended Complaint

be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT IV

25. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's Second Amended Complaint.

26. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's Second Amended Complaint.

27. Denies each and every averment contained in Count IV of plaintiff's Second Amended Complaint not specifically admitted herein.

28. Further answering, Clayton Brokerage states that Count IV of plaintiff's Second Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

29. Further answering, Rachlin states that Count IV of plaintiff's Second Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's Second Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count IV of plaintiff's Second Amended Complaint is barred by the doctrine of laches.

33. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's

Second Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's Second Amended Complaint be dismissed and for its costs herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDER & PARRISH
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants. | ) | |

FIRST AMENDED ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its first amended answer to plaintiff's First Amended Complaint, states and alleges as follows:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's First Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to trade in the commodities future market, and

that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's First Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's First Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's First Amended Complaint.

5. Denies the averments contained in paragraphs 5, 6 and 7 of the plaintiff's First Amended Complaint.

6. Denies each and every averment contained in paragraphs 8 and 9 of Plaintiff's First Amended Complaint.

7. Denies each and every averment contained in the General Allegations of plaintiff's First Amended Complaint not specifically admitted or denied herein.

COUNT I

8. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's First Amended Complaint.

9. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's First Amended Complaint.

10. Denies each and every averment contained in Count I of plaintiff's First Amended Complaint not specifically admitted or denied herein.

11. Further answering, Clayton Brokerage states that Count I of Plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

12. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

13. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's First Amended Complaint.

14. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's

acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

15. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred by the doctrine of laches.

16. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT II

17. Incorporates herein by reference its answers to paragraphs 1 through 19, inclusive, of plaintiff's First Amended Complaint.

18. Denies each and every averment contained in paragraphs 21 through 24, inclusive, of plaintiff's First Amended Complaint

19. Denies each and every averment contained in Count II of plaintiff's First Amended Complaint not specifically admitted or denied herein.

20. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred

because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

22. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count II of plaintiff's First Amended Complaint.

23. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

24. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred by the doctrine of laches.

25. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count II of plaintiff's First Amended Complaint, which this

defendant specifically denies, then plaintiff failed and refused to undertake such action as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count II of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT III

26. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's First Amended Complaint.

27. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's First Amended Complaint.

28. Denies each and every averment contained in Count III of plaintiff's First Amended Complaint not specifically admitted or denied herein.

29. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's First Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint is barred by the doctrine of laches.

33. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

COUNT IV

34. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's First Amended Complaint.

35. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's First Amended Complaint.

36. Denies each and every averment contained in Count IV of plaintiff's First Amended Complaint not specifically admitted or denied herein.

37. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

38. Further answering, Rachlin states that Count IV of plaintiff's First Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

39. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's First Amended Complaint.

40. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this

defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

41. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint is barred by the doctrine of laches.

42. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's First Amended Complaint be dismissed and for its costs, expenses and attorneys' fees herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDE, Attorneys for Defendant Clayton Brokerage

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| DAVID T. JORDAN, Plaintiff, | ) | |
| vs. | ) | Case No. 82-1107-CV-W-9 |
| CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC., and MARTIN M. RACHLIN, Defendants. | ) | |

SEPARATE ANSWER OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC. TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Clayton Brokerage Company of St. Louis, Inc. (hereinafter "Clayton Brokerage"), for its first amended answer to plaintiff's First Amended Complaint, states and alleges as follows:

1. Clayton Brokerage is without sufficient information to form a belief as to the truth or accuracy of the averments contained in paragraph 1 of plaintiff's First Amended Complaint.

2. Admits that it is a Missouri corporation engaged in the business of operating a brokerage house in order to

trade in the commodities future market, and that it maintains an office in Kansas City, Jackson County, Missouri, but denies each and every other averment contained in paragraph 2 of plaintiff's First Amended Complaint.

3. Admits that Martin Rachlin was employed by Clayton Brokerage as manager and as a broker in the Kansas City offices, but is without sufficient information to form a belief as to the truth or accuracy of the other averments contained in paragraph 3 of plaintiff's First Amended Complaint, and therefore denies the same.

4. Admits that Martin Rachlin acted as a registered commodity representative while employed by Clayton Brokerage, but specifically denies that his actions were not diligently supervised by Clayton Brokerage, and denies each and every other averment contained in paragraph 4 of plaintiff's First Amended Complaint.

5. Denies the averments contained in paragraphs 5, 6 and 7 of the plaintiff's First Amended Complaint.

6. Denies each and every averment contained in paragraphs 8 and 9 of Plaintiff's First Amended Complaint.

7. Denies each and every averment contained in the General Allegations of plaintiff's First Amended Complaint not specifically admitted or denied herein.

COUNT I

8. Incorporates herein by reference its answers to paragraph 1 through 9, inclusive, of plaintiff's First Amended Complaint.

9. Denies each and every averment contained in paragraph 11 through 19, inclusive, of plaintiff's First Amended Complaint.

10. Denies each and every averment contained in Count I of plaintiff's First Amended Complaint not specifically admitted or denied herein.

11. Further answering, Clayton Brokerage states that Count I of Plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

12. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

13. Further answering, Clayton Brokerage states that plaintiff waived the action alleged in Count I of plaintiff's First Amended Complaint.

14. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's

acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

15. Further answering, Clayton Brokerage states that Count I of plaintiff's First Amended Complaint is barred by the doctrine of laches.

16. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count I of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count I of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT II

17. Incorporates herein by reference its answers to paragraphs 1 through 19, inclusive, of plaintiff's First Amended Complaint.

18. Denies each and every averment contained in paragraphs 21 through 24, inclusive, of plaintiff's First Amended Complaint

19. Denies each and every averment contained in Count II of plaintiff's First Amended Complaint not specifically admitted or denied herein.

20. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

21. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred

because of defendant's good faith and due diligence in the conduct of its affairs with plaintiff.

22. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count II of plaintiff's First Amended Complaint.

23. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

24. Further answering, Clayton Brokerage states that Count II of plaintiff's First Amended Complaint is barred by the doctrine of laches.

25. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count II of plaintiff's First Amended Complaint, which this

defendant specifically denies, then plaintiff failed and refused to undertake such action as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count II of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT III

26. Incorporates herein by reference its answers to paragraphs 1 through 24, inclusive, of plaintiff's First Amended Complaint.

27. Denies each and every averment contained in paragraphs 26 through 28, inclusive, of plaintiff's First Amended Complaint.

28. Denies each and every averment contained in Count III of plaintiff's First Amended Complaint not specifically admitted or denied herein.

29. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

30. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count III of plaintiff's First Amended Complaint.

31. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claim against this defendant because all of this defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

32. Further answering, Clayton Brokerage states that Count III of plaintiff's First Amended Complaint is barred by the doctrine of laches.

33. Further answering, Clayton Brokerage states that if plaintiff sustained the losses alleged in Count III of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count III of plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

COUNT IV

34. Incorporates herein by reference its answers to paragraphs 1 through 28, inclusive, of plaintiff's First Amended Complaint.

35. Denies each and every averment contained in paragraphs 30 through 36, inclusive, of plaintiff's First Amended Complaint.

36. Denies each and every averment contained in Count IV of plaintiff's First Amended Complaint not specifically admitted or denied herein.

37. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint fails to state a claim against this defendant upon which relief can be granted.

38. Further answering, Rachlin states that Count IV of plaintiff's First Amended Complaint is barred because of this defendant's good faith and diligence in the conduct of its affairs with plaintiff.

39. Further answering Clayton Brokerage states that plaintiff waived the action alleged in Count IV of plaintiff's First Amended Complaint.

40. Further answering, Clayton Brokerage states that plaintiff is estopped from asserting any claims against this

defendant because all of defendant's acts or conduct of which plaintiff complains were ratified or adopted by plaintiff as his own.

41. Further answering, Clayton Brokerage states that Count IV of plaintiff's First Amended Complaint is barred by the doctrine of laches.

42. Further answering, Rachlin states that if plaintiff sustained the losses alleged in Count IV of plaintiff's First Amended Complaint, which this defendant specifically denies, then plaintiff failed and refused to undertake such actions as to mitigate those losses.

WHEREFORE, having fully answered, defendant Clayton Brokerage prays that Count IV of Plaintiff's First Amended Complaint be dismissed and for its costs herein expended and incurred.

/s/ Michael C. Manning
/s/ Bruce E. Baty
MORRISON, HECKER, CURTIS, KUDE, Attorneys for Defendant Clayton Brokerage Company of St. Louis, Inc.

**TRANSCRIPT**
(p. 972, line 11 - p. 976)

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would object to any reference to any other figure or wording on the consolidated statement of financial condition. Specific-

ally, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't -- that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with their outside counsel about contingent cases which are not identified specifically and it would lead to -- could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri,

and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be ready to the jury.

THE COURT: What authority do you have that, Mr. Partin, that would authorize you to read the total assets and the total liabilities?

MR. MATTHEW PARTIN: Well, I think --

THE COURT: And the stockholders' equity?

MR. MATTHEW PARTIN: Well, we got some cases in the supplemental trial brief we filed, Judge, Missouri cases, in which the Missouri Supreme Court -- let me start all over again.

There is one case cited in the supplemental trial brief called Haswell versus -- I think it is Liberty Mutual. It is 557 SW 2nd something something. It is a Missouri Supreme Court decision from the '70's, in which the plaintiff's counsel in

that case made an argument to the effect that the defendant's total assets are, and gave the figure, I suggest you make an award equal to, and then proposed a percentage figure of the total assets.

We don't propose to make that kind of argument, but I think the case is authority for the proposition that asset figures even by themselves could come in. Here, we are simply offering them to show how the $17 million figure was derived. I think that is within the authority of the line of cases that of course allow evidence of net worth.

We are simply showing the components that give rise to the net worth by reading the assets and the liability figures. If we are just reading one or the other, I suppose that might be a different matter, although in light of the Haswell case, I am not sure of that. But what we are doing here is simply showing how the net worth figure is arrived at.

As for the contingent liabilities paragraph, I don't know of any case in Missouri -- well, I should say I don't know of any reported appellate opinion in Missouri in which this issue has come up. We simply propose to read that there has been evidence in this case there are pending lawsuits against Clayton involving Mr. Rachlin and his activities in the accounts of other customers.

This is just really a subject that is unexplored in the case law, I think. It is conceivable to me that in a situation like this the jury might wonder about the effect of the pendency of the other lawsuits on the financial condition, more particularly on the ability to pay of the defendant.

So that paragraph is directed to that concern. I guess what I am saying in essence is, the paragraph is further indication beyond the numbers that we are going to

read of the ability of the defendant to pay a punitive damages award, which of course under Missouri law is the only reason for offering this type of evidence, to show an ability to pay.

MR. COWDEN: The only thing further, as the Court knows, the purpose of punitive damages is two-fold: Number one, to deter future conduct by this defendant or by others in a similar position.

Number two, to punish this defendant for acts that have occurred if the jury sees fit. In determining whether to punish, there is one figure on this exhibit that is relevant, and that is the net stockholders' equity. That is that amount of money that would be available to pay to either this plaintiff or anybody else at this point in time. So that is the figure that is relevant on the defendant's ability to pay and with respect to the issue of possible punishment.

I believe that is the traditional way in which corporations' net equity is shown to the jury is to read this one figure, to advise the jury the total of the stockholders' equity of Clayton Brokerage Company is, and then to quote the figure. It is up to plaintiff's counsel, I suppose, in closing argument if he so sees fit to advise the jury as to how they are supposed to use that number, if at all.

I think it would be very confusing to the jury if they are given a figure of $46,737,713 in total assets, and they are given a liability figure, and then they are given a total net stockholders' equity figure.

THE COURT: I agree with you. I think net worth is the only dollar figure under the circumstances of the information available here, that should be read to the jury.

MR. MATTHEW PARTIN: That concludes the plaintiff's reading of the deposition.

THE COURT: Anything further?

MR. WILLIAM PARTIN: At this time I would like to read from Plaintiff's Exhibit 48, Consolidated Statement of Financial Condition on January 31, 1985 of Clayton Brokerage Company of St. Louis, Incorporated; that the net worth or total stockholders' equity as it is referred to on this exhibit of Clayton Brokerage Company at that date was $17,491,724.

THE COURT: Anything further, Mr. Partin?

MR. WILLIAM PARTIN: Your Honor, as we told you earlier in the afternoon, there may be some other exhibits that were identified that might need to be offered. I will need a moment to look at them. I will need more than a moment.

**TRANSCRIPT**

(p. 1062, Line 10 - p. 1063, line 5;
Complete Statement Of Clayton's Net
Worth Objection In Instruction Conference)

The equal protection of the law clause comes into play because plaintiff has placed before the jury a figure which represents defendant Clayton's shareholders' equity or net worth, which was something in excess of $17 million. It is anticipated that plaintiff's counsel will argue in his closing argument that the jury should consider the net worth of the defendant in deciding whether to punish the defendant.

Therefore, the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's.

Therefore simply because this defendant has a certain net worth which is before the jury, it is subject to possible punishment, whereas another defendant with a smaller net worth would not be subject to the same punishment.

THE COURT: Anything further?

MR. COWDEN: No, Your Honor.

**TRANSCRIPT**

(p. 1097, line 18 - p. 1098, line 3;
Plaintiff's Closing Argument Re Net Worth)

How much should you give in punitive damages? Basically, that is up to you. When we brought this suit, we had to name a figure. We did. We said $1,600,000.

Here are some guidelines; David Jordan was worth $100,000 when Clayton did this to him. You heard Mr. Baty read that from his application. $100,000 was Mr. Jordan's net worth, his life savings.

Clayton took $8,000 of that from him. Well, that is eight percent of his net worth. Clayton is worth about $17,500,000. But if you took eight percent from Clayton, that would be $1,400,000.

**BRIEF OF APPELLANT-DEFENDANT CLAYTON BROKERAGE COMPANY**

Pps. 45-56; Complete Discussion of Equal Protection/Net Worth Issue

Counsel also argued at the instruction conference that the Equal Protection Clause of the Fourteenth Amendment to the Constitution was violated because plaintiff informed the jury of Clayton's net worth which evidence was objected to as well. (T. 971-984; 1062-1063). This information and plaintiff's argument in relation thereto implied that it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.

FILED
APR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1483

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
*Petitioner,*

vs.

DAVID T. JORDAN,
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

## REPLY BRIEF FOR PETITIONER

KENTON E. KNICKMEYER
THOMPSON & MITCHELL
Suite 3400
One Mercantile Center
St. Louis, MO 63101
(314) 231-7676

*Counsel for Petitioner*
*Clayton Brokerage Co. of*
*St. Louis, Inc.*

Of Counsel:

MIKE W. BARTOLACCI
THOMPSON & MITCHELL
Suite 3400
One Mercantile Center
St. Louis, MO 63101
(314) 231-7676

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

10 pp

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On Petition for a Writ of Certiorari to the
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## REPLY BRIEF FOR PETITIONER

### I. CLAYTON'S PETITION WAS TIMELY FILED

A timely petition for rehearing tolls the running of the 90-day period in which a petition for certiorari may be filed because it suspends the effectiveness of the Court of Appeals' initial determination of the case. *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942). Clayton timely filed a petition for rehearing *en banc* with the U.S. Court of Appeals for the Eighth Circuit. The U.S. Court of Appeals for the Eighth Circuit treats all such petitions as also requesting rehearing by the panel, as is reflected by the Eighth Circuit's Order of December 8, 1988, denying both rehearing and rehearing *en banc.*

The mandate of the court of appeals issues 21 days after entry of the judgment. Federal Rule of Appellate Procedure, Rule 41(a)(1988). Timely filing of a Petition for Rehearing stays issuance of the court's mandate, with the mandate then issuing within 7 days after an order denying the petition. *Id.* The mandate in this case did not issue until after entry of the court's Order of December 8, 1988, denying both rehearing and rehearing *en banc*. Therefore, because Clayton's petition was sufficient to bring its request before the panel, the judgment of the Court did not become final until December 8, 1988, and Clayton's petition for rehearing *en banc* effectively suspended the time in which Clayton was permitted to file its petition for writ of certiorari with the Court. *See* Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed.), § 6.3 at 313 (1986).

## II. THE COURT SHOULD DECIDE THE QUESTIONS RAISED BY CLAYTON'S PETITION

Jordan does not dispute the significance of the Questions 1, 3 and 4 raised by Clayton's Petition for Certiorari, but rather, argues that the Court should decline to hear these questions on the grounds that they were not adequately presented to the District Court or the Court of Appeals. The Court should reject Jordan's argument and address each of the issues raised by Clayton's Petition.

The Supreme Court has jurisdiction to review the judgments of state courts by virtue of 28 U.S.C. § 1257(a). Section 1257(a) expressly states that the Court may review state court decisions when treaties or statutes of the United States are involved or when the parties have specifically raised a federal question. 28 U.S.C.A. § 1257(a) (Supp. 1989).

Despite this language, decisions of this Court establish that the failure to present a question to the lower courts does not deprive the Court of jurisdiction to decide that question, but rather, the tendency to refrain from hearing such cases is found-

ed solely upon prudential concerns. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw,* 108 S. Ct. 1645, 1651 (1988); *Illinois v. Gates,* 462 U.S. 213, 217-220 (1983). In both *Bankers Life* and *Gates,* the Court was faced with petitions for certiorari to state courts.

Although the punitive damages in this case were awarded under a state law theory, the case was tried in a federal district court and appealed to the United States Court of Appeals for the Eighth Circuit. Therefore, this Court's jurisdiction to review the decision of the Court of Appeals is founded on 28 U.S.C. § 1254(1), rather than Section 1257. Unlike Section 1257, Section 1254(1) does not even purport to require that the federal question has been raised in the lower courts as a jurisdictional prerequisite to a writ of certiorari. Clearly then, if the Court has the power to hear questions on a writ of certiorari which were not previously presented to state courts, it has the power to hear such questions on petitions for writ of certiorari from the United States Courts of Appeals.

### A. This Is An Appropriate Case To Review What Limits The Excessive Fines Clause Imposes On Punitive Damage Awards

Jordan argues that the Court should refuse to decide whether the punitive damage award in this case violated the Eighth Amendment's prohibition of excessive fines because Clayton did not challenge the constitutionality of the punitive damage award in the lower courts, but rather argued that the award was excessive as a matter of state law. The concerns which have led the Court to refrain from hearing questions presented for the first time in a petition for certiorari are those of comity and a need to have a fully developed record on appeal. *See Illinois v. Gates,* 462 U.S. at 221-23. This case presents neither of those concerns.

Clayton's constitutional challenge to the punitive damage award assessed against it does not run afoul of any principles of

comity because, unlike *Bankers Life and Casualty Co. v. Crenshaw, supra,* this case was heard exclusively by the federal courts. Therefore, addressing the constitutional issues at this juncture will not deprive the Missouri courts of the opportunity to have interpreted Missouri's law regarding punitive damages in a way that would have been consistent with the United States Constitution.

Furthermore, the Court has already agreed to determine whether the Excessive Fines Clause of the Eighth Amendment to the Constitution of the United States applies to awards of punitive damages in civil cases. *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.,* 845 F.2d 404 (2d Cir. 1988), *cert. granted,* 57 U.S.L.W. 3394 (U.S. Dec. 5, 1988) (No. 88-556). Should the Court decide that the excessive fines clause does apply to civil awards of punitive damages, it will then become necessary to provide some guidance as to what fines may be considered excessive under the Constitution. Because the lower courts specifically held that the punitive damage award in this case was not excessive under Missouri law, this case presents an appropriate vehicle to discuss what fines may be considered excessive under the Eighth Amendment.

There is no need for further development of the record in order to resolve this question. Whether the punitive damage award in this case was excessive under the law of Missouri was fully and vigorously argued by both parties, and was resolved by the lower courts in favor of Jordan. This Court is thus presented with a fully developed record as to the criteria by which Missouri determines the amount of punitive damage awards. Whether those criteria produced an award which is consistent with the Eighth Amendment is a legal question requiring no further examination or appraisal of evidence. In such a case, there is no reason for the Court to refuse to consider the question presented. *See, e.g., Kiefer-Stewart v. Seagram,* 340 U.S. 211, 215 (1951).

**B. Clayton Has Not Waived Consideration Of The Equal Protection And Due Process Issues Raised By Question 3**

Question 3 of Clayton's Petition asks the Court to consider whether the Due Process and Equal Protection Clauses are implicated by proceedings which allow a lay jury to both determine fault and assess penalties, permits penalties to be influenced by the degree of the defendant's wealth, and permits such evidence to be presented prior to any finding of culpability. Jordan misinterprets question 3 as suggesting that bifurcated proceedings are constitutionally required in any punitive damages case, and thus argues that Clayton has waived consideration of this question because it did not move for a bifurcated trial in the District Court.

While it is conceivable that bifurcated proceedings may alleviate some of the problems presented by punitive damage cases, Clayton does not argue that bifurcation is *the* constitutionally prescribed remedy for those concerns. Clayton merely asks the Court to determine whether such proceedings are constitutionally infirm.

If the Court determines that the proceedings followed in this case violated Clayton's rights to due process and equal protection, one potential remedy might be a limiting instruction. In fact, Clayton raised an equal protection objection at the instruction conference in the District Court, and requested a limiting instruction concerning the evidence of Clayton's net worth. This request was denied. Therefore, Clayton did present its equal protection arguments to the District Court. Furthermore, Clayton raised its equal protection objections on appeal to the Eighth Circuit.

**C. This Court Should Determine Whether The Commodity Exchange Act Preempts State Law.**

The punitive damage award in this case was based on a common law theory of breach of fiduciary duty. Question 4 of

Clayton's Petition asks the Court to determine whether that common law remedy has been preempted by Sections 4b and 4c of the Commodity Exchange Act ("CEA"), as amended. 7 U.S.C. § 6b, 6c. Jordan argues that the Court should not consider this question because Clayton failed to argue its preemption objections in the lower courts. Clayton did not pursue the preemption argument in the lower courts because to do so would have been futile after the decision in *Kerr v. First Commodity Corp. of Boston,* 735 F.2d 281 (8th Cir. 1984), holding that the CEA did not preempt state law remedies. Further, Clayton did not raise the preemption issue in the Court of Appeals because it is the practice of the Eighth Circuit that each panel of the court is bound by the prior decisions of the court. *See United States v. Lewellyn,* 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard,* 706 F.2d 267, 269 (8th Cir.) *cert. denied,* 464 U.S. 934 (1983).

The Court should address the preemption question. As noted in Clayton's Petition for Writ of Certiorari, this question has been resolved in conflicting fashion among the lower courts, and presents a question of substantial importance to the commodity futures industry. Furthermore, the Eighth Circuit fully considered the question and explained its reasons for finding that state law remedies are not preempted by the CEA in its opinion in *Kerr v. First Commodity Corp. of Boston, supra.* Therefore, this Court has an ample basis upon which to evaluate the reasoning of the Eighth Circuit regarding the preemption question, and no further development of the record is needed to decide this question.

Respectfully submitted,

Kenton E. Knickmeyer
Thompson & Mitchell
Suite 3400
One Mercantile Center
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Petitioner,
Clayton Brokerage Co. of
St. Louis, Inc.

Of Counsel:

Mike W. Bartolacci
Thompson & Mitchell
Suite 3400
One Mercantile Center
St. Louis, MO 63101
(314) 231-7676